CEQA Update, Issues and Trends
State Water Resources Control Board (and friends)

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Introductions and Agenda

CEQA and Litigation Considerations

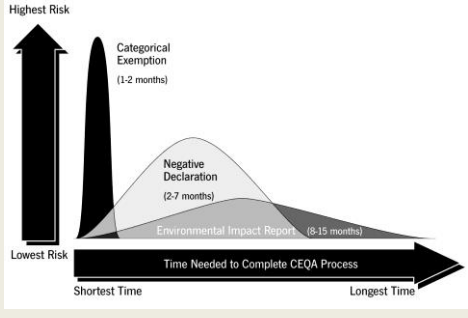
What is "Legally Adequate" Under CEQA?

- Adhering to both the spirit and letter of CEQA
- The highest level of compliance we can prepare within the time and budget constraints of staff and management
- Anything where we don't get challenged
- Whatever we did last time (and didn't get challenged)
- Whatever my manager says
- Whatever Ken and Jim say

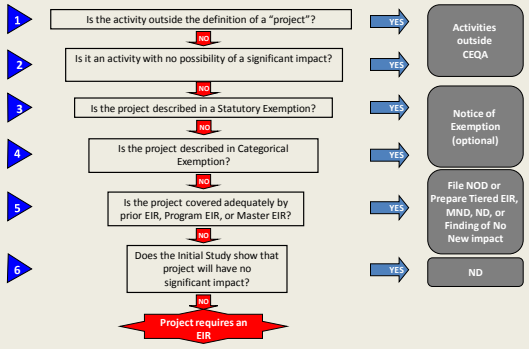
Three Levels of Compliance

- Bare legal minimum
- Good practice
- Excessive documentation

Risk v. Time in the CEQA Compliance Process



Screening for CEQA Applicability



CEQA's Direction on Level of Information

- **WRITING:** EIRs shall be written in plain language and may use appropriate graphics so that decision makers and the public can rapidly understand the documents
- **PAGE LIMITS:** The text of draft EIRs should normally be less than 150 pages and for proposals of unusual scope or complexity should normally be less than 300 pages
- **INTERDISCIPLINARY APPROACH:** An EIR shall be prepared using an interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the consideration of qualitative as well as quantitative factors.
  - The interdisciplinary analysis shall be conducted by competent individuals, but no single discipline shall be designated or required to undertake this evaluation

CEQA Guidelines Sections 15140 - 15142

CEQA's Direction on Level of Information

- TECHNICAL DETAIL:
  - The information contained in an EIR shall include summarized technical data, maps, plot plans, diagrams, and similar relevant information sufficient to permit full assessment of significant environmental impacts by reviewing agencies and members of the public.
  - Placement of highly technical and specialized analysis and data in the body of an EIR should be avoided through inclusion of supporting information and analyses as appendices to the main body of the EIR.
  - Appendices to the EIR may be prepared in volumes separate from the basic EIR document, but shall be readily available for public examination and shall be submitted to all clearinghouses which assist in public review

CEQA Guidelines Sections 15147

CEQA's Direction on Level of Information

- **EMPHASIS:** The EIR shall focus on the significant effects on the environment.
  - The significant effects should be discussed with emphasis in proportion to their severity and probability of occurrence
  - Effects dismissed in an Initial Study as clearly insignificant and unlikely to occur need not be discussed further in the EIR unless the Lead Agency subsequently receives information inconsistent with the finding in the Initial Study. A copy of the Initial Study may be attached to the EIR to provide the basis for limiting the impacts discussed

CEQA Guidelines Sections 15143

CEQA's Direction on Level of Information

- **DEGREE OF SPECIFICITY:** The degree of specificity required in an EIR will correspond to the degree of specificity involved in the underlying activity which is described in the EIR.
  - An EIR on a construction project will necessarily be more detailed in the specific effects of the project than will be an EIR on the adoption of a local general plan or comprehensive zoning ordinance because the effects of the construction can be predicted with greater accuracy.
  - An EIR on a project such as the adoption or amendment of a comprehensive zoning ordinance or a local general plan should focus on the secondary effects that can be expected to follow from the adoption or amendment, but the EIR need not be as detailed as an EIR on the specific construction projects that might follow.

CEQA Guidelines Sections 15146

CEQA's Direction on Level of Information

- FORECASTING: Drafting an EIR or preparing a Negative Declaration necessarily involves some degree of forecasting. While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can
- SPECULATION: If, after thorough investigation, a Lead Agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact

CEQA Guidelines Sections 15144, 15145

CEQA's Standard

- An EIR should be prepared with a sufficient degree of analysis to provide decision makers with information which enables them to make a decision which *intelligently takes account of environmental consequences*
- An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of *what is reasonably feasible*
- The courts have looked not for perfection but for adequacy, completeness, and a *good faith effort at full disclosure*

CEQA Guidelines Section 15151

Judicial Review: Role of the Courts in CEQA

- CEQA is essentially enforced through litigation (no CEQA police)
- Access to courts provides avenue for citizen enforcement of CEQA
- Judiciary plays important role in CEQA interpretation
- Potential legal challenge encourages agency compliance

District Courts of Appeal in California

Contents of the Administrative Record

(more to come later in the day ...)

- All project application material
- Staff reports
- Records from public hearings
- Public notices
- Written comments received
- Proposed decision and findings
- All other documents related to agency decision-making process in complying with CEQA

Note: this may not be the same as what is required to be submitted by the agency through a Public Records Act request

Public Resources Code Sec. 21167.6

Typical Litigation Issues

- Definition of project
- Use of categorical exemptions
- Failure to prepare an EIR
- EIR adequacy (environmental setting, impact analysis, cumulative impact analysis, mitigation measures, alternatives)
- Procedural requirements of CEQA

Typical Procedural Defenses

- Statute of limitations
- Standing
- Exhaustion of administrative remedies
- Mootness

CEQA's Standard of Judicial Review

- Whether there is substantial evidence to support the agency decision
  - Note special application of standard for ND or MND and Categorical Exemptions
- Whether the agency failed to proceed in the manner required by law

What Is Substantial Evidence?

- Facts
- Reasonable assumption predicated on facts
- Expert opinion supported by facts
- It does not include *argument, speculation, unsubstantiated opinion or narrative, clearly inaccurate or erroneous information, or socioeconomic impact not linked to physical environmental impact*

CEQA Guidelines sec. 15384

Possible Court-Ordered Remedies in CEQA Cases

A court finding a CEQA violation in a peremptory writ may order that:

- Challenged action should be voided:
  - A portion of the action may be voided if severable
- Agency and real parties in interest suspend all project activities that could have environmental impacts until complying with CEQA; and/or
- Agency will take necessary specific actions to comply with CEQA

Public Resources Code 21168.9

Severability

- A court may limit its order to portions of the agency's action or project activities in noncompliance and allow a portion of the action to go forward if:
  - The portion of action/activities excluded from order are severable from noncomplying portions (where the defects in CEQA document relate to discrete part of project)
  - Severance will not prejudice full CEQA compliance
  - The severable activities do not violate CEQA

Pub. Res Code Section 21168.9

Severability

- Court may apply its equitable powers to allow project activities to proceed pending CEQA compliance
  - *County Sanitation Dist. No. 2 v County of Kern* (2005) 127 Cal.App.4th 1544 – allowing ordinance to stay in place that had been in effect for 2 years
  - *Californians for Alternatives to Toxics v Dept of Food & Agriculture* (2005) 134 Cal.App.4th 1 – allowing pesticide rule to stay in place because it would not moot consideration of alternatives or mitigation
  - *POET v California Air Resources Board* (2013) 217 Cal.App.4th 1214 – allowing regulation related to low carbon fuel standards to remain in place
  - See also cases previous to 21168.9 amendment applying traditional principles of equity:
    - *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal*. (1988) 47 Cal.3rd 376 – allowing University biomedical lab to continue to occupy in purchased building
    - *City of Santee v County of San Diego* (1989) 214 Cal.App.3rd 1438 – allowing County jail to continue operations in expanded portion of facility

Pub. Res Code Section 21168.9

What the Court Is Not *Supposed* To Do

- Substitute its judgment for that of the lead agency:
  - Neg Dec: It will determine whether there is substantial evidence to support a fair argument
  - EIR: It will search to determine whether there is substantial evidence in the record to support the agency's action
- Undertake an independent study of the evidence:
  - The court will rely on the facts contained in the administrative record
- Allow new evidence not in the administrative record

Legislative and Regulatory Update

Why is CEQA Constantly Changing? Who is Responsible?

- Legislature:
  - Typically 5-10 minor bills every year
  - Major changes infrequent; supposed to be last year but now its "water under the bridge"
- Resources Agency:
  - CEQA Guidelines Amendments required every 2 years; current process for major changes this year
- Courts:
  - Typically 20-25 cases appellate decisions every year
  - Different results in different appellate districts

2013 Legislation

All Sizzle and No Steak

- Supposedly 2013 was going to be the Year of CEQA "Reform"
  - (former) Senator Rubio …
  - Over 2 dozen bills introduced but …
  - ECAT/SB 731 discussions but …
- Only 6 bills reached the Governor:
  - AB 277/1267/SB 668: Tribal-State Gaming Compacts
  - AB 417: Bicycle Plans
  - SB 105: Department of Corrections
  - SB 743: "Kings Arena" and remnants of reform

CEQA Guidelines Amendments

- OPR is in process of deciding on topics for drafting amendments (noticed 12/30/2013; comments were due 2/14/2014; proposed draft expected summer 2014)
- OPR will not suggest any changes to Section 15126.2, and whether CEQA requires analysis of impacts of the environment on the proposed project until the California Supreme Court reviews *California Building Industry Assn. v. Bay Area Air Quality Management Dist.*
- Topics that OPR "intends to address in this comprehensive update":
  - Section 15051 (Criteria Identifying Lead Agency)
  - Section 15060.5 (Pre-application Consultation)
  - Section 15061 (Preliminary Review)
  - Section 15063 (Initial Study)
  - Section 15064 (Determining Significance)
  - Section 15064.4 (Determining Significance of GHGs)
  - Section 15065 (Mandatory Findings of Significance)

CEQA Guidelines Amendments

- Section 15082 (NOP)
- Section 15083 (Early Public Consultation)
- Section 15087 (Public Review of Draft EIR)
- Section 15088 (Response to Comments)
- Section 15091 (Findings)
- Section 15107 (Negative Declaration)
- Section 15124 (Project Description)
- Section 15125 (Environmental Setting)
- Section 15126.4 (Mitigation Measures)
- Section 15126.6 (Alternatives)
- Section 15152 (Tiering)
- Section 15155 (Consultation with Water Agencies)
- Section 15168 (Program EIR)
- Section 15182 (Projects Pursuant to a Specific Plan)
- Section 15222 (Joint Documents)
- Section 15269 (Emergency Projects)
- Section 15301 (Existing Facilities)

CEQA Guidelines Amendments

- Section 15357 (Discretionary Project)
- Section 15370 (Mitigation)
- Section 15378 (Project)
- Appendix G: Environmental Study Checklist
  - Add question on conversion of open space
  - Add question on cumulative loss of agricultural land.
  - Add question on fire hazard questions (SB 1241)
  - Move the question about geologic features and paleontological features from the cultural resources section to the geology section
  - Remove question (c) in land use planning because already covered in biological resources
- Appendix G: Environmental Study Checklist (continued)
  - Add question on providing excess parking
  - Clarify utilities; add questions related to energy infrastructure
  - Revise the questions regarding biological resources and mandatory findings of significance to be consistent with Section 15065
- Appendix J (Examples of Tiering)
- New Appendix (Mitigation Monitoring and Reporting Program)
- New Appendix (Supplemental Review Checklist)
- New Appendix (Transportation Analysis)

CEQA In The Courts

CEQA Cases Pending Review in California Supreme Court

California Supreme Court Review Granted

- *City of San Diego v. Trustees of the California State University*, S199557. *[appellate opinion was at 201 Cal.App.4th 1134*]

  Does state agency, that may have obligation to make "fair-share" payments for mitigation of off-site impacts of proposed project satisfy its duty to mitigate by stating that it sought funding from Legislature to pay for such mitigation and that, if the requested funds are not appropriated, it may proceed with the project on the ground that mitigation is infeasible?

California Supreme Court Review Granted

- *Berkeley Hillside Preservation v. City of Berkeley*, S201116 [*appellate opinion was at 203 Cal.App.4th 656*]

  Did City properly conclude that the proposed project (a very large house) was categorically exempt under Classes 3 (new construction of small structures) and 32 (infill), and that the "unusual circumstances" exception under Section 15300.2(c) did not remove the project from the scope of those categorical exemptions?

California Supreme Court Review Granted

- *City of Hayward v. Board of Trustees of the California State University,* S203939 [*appellate opinion was at 207 Cal.App.4th 446*]

  Raises issues similar to those in *City of San Diego v. Trustees of the California State University;* court has deferred briefing on case until it has decided the *City of San Diego* case

California Supreme Court Review Granted

- *Tuolumne Jobs & Small Business Alliance v. Superior Court of Tuolumne County*, S207173 [*appellate opinion was at 210 Cal.App.4th 1006*]
  - Must a city comply with CEQA before adopting an ordinance enacting a voter-sponsored initiative pursuant to Elections Code section 9214(a)?
  - Is the adoption of an ordinance enacting a voter-sponsored initiative under Elections Code section 9214(a), a "ministerial project" exempt from CEQA (Pub Res Code section 21080(b)(1))?

California Supreme Court Review Granted

- *California Building Industry v. Bay Area Air Quality Management District,* S213478, [*appellate opinion was at 218 Cal.App.4th 1171*]

  Under what circumstances, if any, does CEQA require an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project?

California Supreme Court Review Granted

- *Friends of the College of San Mateo Gardens v. San Mateo Community College District*, S214061 (2013) (*unpublished*) - continued

  When a lead agency performs a subsequent environmental review and prepares a subsequent environmental impact report, a subsequent negative declaration, or an addendum, is the agency's decision reviewed under a substantial evidence standard of review (*Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385), or is the agency's decision subject to a threshold determination whether the modification of the project constitutes a "new project altogether," as a matter of law (*Save our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288)?

California Supreme Court Review Granted

- *Center for Biological Diversity v. Department of Fish & Wildlife*, S217763. [*Appellate Opinion was at 224 Cal.App.4th 1105*]
  - Does the California Endangered Species Act (Fish & Game Code, § 2050 et seq.) supersede other California statutes that prohibit the taking of "fully protected" species, and allow such a taking if it is incidental to a mitigation plan under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.)?
  - Does CEQA restrict judicial review to claims presented to agency before the close of the public comment period on DEIR?
  - May an agency deviate from the Act's existing conditions baseline and instead determine the significance of a project's greenhouse gas emissions by reference to a hypothetical higher "business as usual" baseline?

California Supreme Court Review Granted

- *Citizens for Environmental Responsibility v. State ex rel. 14th Dist. Ag. Assn.*, S218240 [*Appellate Opinion was at 224 Cal.App.4th 1542*]

  Petition for review after the Court of Appeal affirmed the judgment for the state. The court ordered briefing deferred pending decision in *Berkeley Hillside Preservation v. City of Berkeley,* S201116 (#12-58), which presents the following issue:
  - Did the City of Berkeley properly conclude that a proposed project was exempt from CEQA under the categorical exemptions set forth in California Code of Regulations, title 14, sections 15303(a) and 15332, and that the "Significant Effects Exception" set forth in section 15300.2(c), did not operate to remove the project from the scope of those categorical exemptions?

Trigger for CEQA: Definition of "Project"

Definition of Project

- A Project is:
  - Whole of an Action
  - Must have potential to change physical environment (directly or indirectly)
  - Must be subject to discretionary government approval

14 Cal Code of Regulations § § 15002(i), 15378

Definition of Project

- An agency action is NOT a project (or is otherwise exempt):
  - Planning/feasibility studies (example: study to narrow potential sites for future review in an EIR) (14 CCR 15262)
  - Projects that are statutorily or categorically exempt (many locations in statute, plus Articles 18 and 19 of Guidelines)
  - Projects that can be determined, with certainty, to have no significant effect on the environment (14 CCR 15061(b)(3))

Approval

- The decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person
- The exact date of approval of any project is a matter determined by each public agency according to its rules, regulations, and ordinances. Legislative action in regard to a project often constitutes approval
- With private projects, approval occurs upon the earliest commitment to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or other entitlement for use of the project

14 Cal Code of Regulations § 15352

Activity Is Not Subject to CEQA if:

- Activity does not involve exercise of discretionary powers;
- Activity will not result in direct or reasonably foreseeable indirect physical change in the environment; or
- Activity is not a project defined by 15378

Note: where lead agency enters into agreements prior to CEQA, it may be a project. CA Supreme Court stated that "we look both to the agreement itself and to the surrounding circumstances, as shown in the record of the decision, to determine whether an agency's authorization or execution of an agreement for development constitutes a 'decision … which commits the agency to a definite course of action in regard to a project.' (Cal. Code Regs., tit. 14, §15352.)" *Save Tara v. City of West Hollywood* 45 Cal. 4th 116 (2008)

14 Cal Code of Regulations § 15060(c)

What Constitutes an "Approval"?

- *POET v. California Air Resources Board* (2013) 217 Cal.App.4th 1214
- *City of Irvine v. County of Orange* (2013) 221 Cal.App.4th 846

POET v. CARB

- *Court finds that CARB violated CEQA by (i) prematurely de facto approving AB 32 regulations addressing low carbon fuel standards (LCFS) prior to completion of CEQA process and (ii) failing to make any commitment to mitigate for increases in NOx emissions; but court leaves regulations in effect during remand period while CARB comes into compliance with CEQA*

POET v. CARB (cont.)

- CARB's regulatory program has been certified by the Natural Resources Agency as requiring the functional equivalents of negative declarations and EIRs (see Pub. Resources Code, § 21080.5)
  - State agencies with such certifications need not prepare formal negative declarations and EIRs, but are "subject to other provisions in CEQA such as the policy of avoiding significant adverse effects on the environment where feasible"
  - Such agencies are subject to rules governing the timing of approvals, as set forth in CEQA Guidelines section 15004 and addressed by the California Supreme Court in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116

POET v. CARB (cont.)

- How to calculate "*carbon intensity values*" was source of controversy during the public process
  - CARB staff's calculations accounted for greenhouse gas emissions from expected land use changes indirectly caused by increased demand for crop-based biofuels (i.e., conversion of grasslands and forest to agriculture)
  - This approach tended to make ethanol less attractive than other biofuels, and ethanol producers complained

POET v. CARB (cont.)

- Shortly after close of comment period of "Initial Statement of Reasons" (ISOR) (the functional equivalent of a draft EIR), the CARB Board:
  - "approved for adoption" the proposed LCFS regulations
  - designated the Executive Officer as the decisionmaker for purposes of responding to environmental issues and making further nonsubstantive modifications
    - After discussion, Board specifically precluded Executive Officer from altering carbon intensity values based on land use changes and other indirect effects
- Immediately afterward, the Board issued a press release stating it had "adopted a regulation" that would implement Governor Schwarzenegger's LCFS standard
- Seven months later, the Executive Officer issued executive order adopting the regulations and passed them on to the Office of Administrative Law (OAL)

POET v. CARB (cont.)

- This process violated the rules set forth in *Save Tara*, as the CARB Board effectively committed itself to the proposed LCFS regulations without substantive change prior to completion of CEQA process
  - Statements in press release were unqualified and "increased the political stakes" going forward
  - The Board's resolution "effectively precluded the Executive Officer from adopting alternatives to the [proposed] carbon intensity values based on land use or other indirect effects"

POET v. CARB (cont.)

- The Executive Officer did not qualify as the "decision-making body" with the responsibility for completing the CEQA process
  - CEQA Guidelines section 15025 allows decision-making bodies to delegate to staff the preparation of responses to comments, but not the consideration of a final EIR or the adoption of CEQA Findings (or their functional equivalents, according to the court)
  - Here, the CARB Board did not delegate the Executive Officer the authority to approve or disapprove the project or to address the controversy over the carbon intensity values

POET v. CARB (cont.)

- "[T]he separation of the approval function from the review and consideration of the environmental assessment is inconsistent with the purpose served by an environmental assessment as it insulates the person or group approving the project 'from public awareness and the possible reaction to the individual members' environmental and economic values.'"

POET v. CARB (cont.)

- CARB violated CEQA by proceeding with the LCFS regulations without attempting to formulate mitigation measures for expected increases in NOx emissions
  - CARB recognized that biodiesel fuels and biodiesel blends emit more NOx than the diesel fuels they will replace, but denied any increase in NOx emissions from the regulations
  - Instead of requiring reductions in NOx contents of biodiesel fuels and blends as part of LCFS regulations, CARB staff stated in responses to comments that, in the future, CARB would ensure the avoidance of any increase in NOx emissions by promulgating "a new motor vehicle fuel specification for biodiesel"

POET v. CARB (cont.)

- CARB's approach violated principles governing the deferral of mitigation measures
  - CARB did not commit to any *performance standard* for ensuring no increase in NOx emissions as part of approval of regulations
  - CARB did not make implementation of the regulations conditional on the satisfaction of a "no increase" performance standard
  - "No increase in NOx" is not a specific performance criterion anyway; CARB "established no objective performance criteria for *measuring whether the stated goal would be achieved*"
    - "[I]t is unclear what tests will be performed and what measurements will be taken to determine that biodiesel use is not increasing NOx emissions"

POET v. CARB (cont.)

- Court orders that regulations be voided but that they remain in effect, and not be suspended, during the period needed to achieve CEQA compliance
  - Under the remedy section of CEQA (Pub. Resources Code, § 21168.9), a court's decision to void an approval does not always require that operation of a project be suspended during the remand period
  - Rather, suspension must be supported by two findings:
    - a specific project activity or activities will prejudice the consideration or implementation of mitigation measures or alternatives
    - the suspended activity "could result in an adverse change or alteration to the physical environment"

POET v. CARB (cont.)

- In this case, allowing the regulations to remain in effect during the remand period would not prejudice consideration of mitigation measures or alternatives
  - "Written standards, unlike projects involving the construction of facilities, do not become part of the physical environment"
  - In exercising its equitable discretion, the court should consider the environmental effect of suspension
    - Here, the environment will be better off without suspension as the regulations help to achieve AB 32 targets

City of Irvine v. County of Orange

- *Court upholds action of Orange County Board of Supervisors approving an application to the State Department of Corrections and Rehabilitation (DCR) for $100 million for funding a 512-bed expansion of James A. Musick Jail Facility*
  - Board action was not a "project approval" under CEQA
    - The application did not commit the County to proceed with the expansion
    - "At most, it permitted the County to explore the possibility of using state funds to expand the Musick Facility"

City of Irvine (cont.)

- State law enacted in 2007 (AB 900) provided for up to $1.2 billion for two phases of local jail construction
- State law enacted in 2011 (AB 109) shifted responsibility for jailing certain low level offenders to counties, increasing the costs of local jails
- Orange County filed application for $100 in 2011
  - Board approval resolution states that County will comply with CEQA prior to *acceptance* of State funds
- Irvine sued, claiming non-compliance with CEQA and citing California Supreme Court's 2008 decision in *Save Tara v. City of West Hollywood*

City of Irvine (cont.)

- Under *Save Tara*, an agency must not take an action that significantly furthers a project in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of the CEQA review of the project
  - Court looks at the *legal question* of whether, under the *totality of circumstances,* the agency, *as a practical matter*, has *effectively committed* itself to the project
  - The agency must retain the alternative of not going forward with the project

City of Irvine (cont.)

- Under this standard as applied in cases such as *Cedar Fair v. City of Santa Clara* (2011) 194 Cal.App.4th 1150, the court focuses on the agency's *level of commitment* to a project, not on whether a binding agreement of some kind has been reached
  - An agency does not commit itself to a project simply by being a proponent or advocate of the project
  - An agency may even have "high esteem" for a project

City of Irvine (cont.)

- Here, any "*conditional award*" would merely "authorize the County and the state to explore and evaluate the possibility of expanding the Musick Facility"
  - Terms of AB 900 award program would require the County to work with the State to develop Master Plan for proposed expansion
  - The County would then have to act as lead agency for the CEQA document for the proposed Master Plan, with DCR a responsible agency
    - County retained "discretion whether and how to mitigate any significant environmental effects associated with the . . . expansion and which alternatives, if any, to consider or adopt"
  - County would also have to obtain all local approvals and State approval of construction plans to become eligible for reimbursements under terms of AB 900 program

City of Irvine (cont.)

- The court concluded that the Board's action did not have the practical effect of committing the County to the expansion
  - "[T]he County's commitment of both human and financial resources to developing the . . . expansion plan and preparing the . . . Application does not demonstrate the commitment required to transform the Application into an approval requiring CEQA compliance"
  - The existence of detailed design work did not trigger CEQA review in the absence of a commitment to the project

Exemptions

Once It Is Deemed a "Project," Activity Is Exempt from CEQA if:

- Statutory exemption applies
- Categorical exemption applies (and no exceptions are triggered)
- General rule exemption applies: "where it can be seen with certainty" that there is no possibility that the activity may have a significant effect on the environment"
- Project will be rejected or disapproved

Agencies should always consider filing NOE with SCH/County Clerk to shorten statute of limitations

14 Cal Code of Regulations § 15061

Statutory Exemptions

- Application depends upon description in statute
- May be extensive, or rather limited
- Activity/project must fall within the four corners of the exemption
- When in doubt, document

Categorical Exemptions

- Project must fit within 1 or more of the 33 classes of exemptions
- CE cannot be used when any exceptions under Guidelines Section 15300.2 exist
- Cannot adopt a "mitigated categorical exemption" (*Salmon Protection and Watershed Network v. County of Marin* (2005) 125 Cal.App.4th 1098)
- When in doubt, document

Categorical Exemptions

Class 1	Operation, repair, or maintenance of existing structures or facilities
Class 2	Replacement or reconstruction of existing structures or facilities
Class 3	Construction or conversion of small new facilities
Class 4	Minor alterations of land, water, or vegetation
Class 5	Minor alterations in land use limitations
Class 6	Data collection, research, experimental management, or resource evaluation
Classes 7 and 8	Public agency maintenance, restoration, or enhancement of environmental or natural resources
Class 9	Inspections of operations or projects
Class 10	Loans under Veterans Farm and Home Purchase Act and mortgages for existing structures
Class 11	Construction or placement of accessory structures
Class 12	Surplus government property sales
Class 13	Acquisition of lands for wildlife conservation purposes
Class 14	Minor additions to existing schools
Class 15	Minor land divisions
Class 16	Transfer of land ownership to create parks
Class 17	Open space contracts or easements
Class 18	Designation of wilderness areas

14 Cal Code of Regulations § § 15301-15318

Categorical Exemptions

(Cont.)

Class 19	Annexations of existing facilities and lots for exempt facilities
Class 20	Changes in organization of local agencies
Class 21	Enforcement actions by regulatory agencies
Class 22	Educational or training programs involving no physical changes
Class 23	Normal operations of facilities for public gatherings
Class 24	Regulations of employee wages, work hours, or working conditions
Class 25	Transfers of ownership of interest in land to preserve existing natural conditions and historical resources
Class 26	Acquisition of housing for housing assistance programs
Class 27	Leasing new facilities exempt from CEQA
Class 28	Small hydroelectric projects at existing facilities
Class 29	Cogeneration projects at existing facilities
Class 30	Minor alterations to prevent, minimize, stabilize, mitigate, or eliminate the release of hazardous waste or hazardous substances
Class 31	Historical resource restoration or rehabilitation
Class 32	Infill development projects
Class 33	Small habitat restoration projects

14 Cal Code of Regulations § § 15319-15333

Review of Categorical Exemptions

- Is the project within one or more of the classes of exempt projects? Determination is agency's to make, based on substantial evidence in the record
- Is there a reasonable possibility that the activity may have a significant environmental impact because of unusual circumstances (CEQA Guidelines sec. 15300.2):
  - "Fair argument" for potential significant impact (?)
  - Cumulative impacts would be significant
  - Project within certain classes occur in specified sensitive environments
  - Project affects scenic resources within official state scenic highways
  - Project is located on a listed hazardous waste site ("Cortese List")
  - Project causes substantial adverse changes in significant historic resources

General Rule Exemption

- Also called the "common sense" exemption
- CEQA does not apply where it can be "seen with certainty" that there no possibility the project may have a significant effect (Guidelines 15061(b)[3])
- Use with care – "seen with certainty" is a low threshold (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106)
- Approved by CA Supreme Court (consistent with Section 15183 "peculiar to the project" rule) in *Muzzy Ranch v. County of Solano County Airport Land Use Commission* (2007) 41 Cal. 4th 372

EXEMPTION CASES

- *Save the Plastic Bag Coalition v. County of Marin* (2013) 218 Cal.App.4th 209
- *Save the Plastic Bag Coalition v. City and County of San Francisco* (2014) 222 Cal.App.4th 863
- ~~*Citizens for Environmental Responsibility v. State of California ex rel. 14th District Agricultural Association*~~
- *San Francisco Beautiful v. City and County of San Francisco* (2014) 226 Cal.App.4th 1012
- *North Coast Rivers Alliance v. Westlands Water District* (2014) ___ Cal.Rptr.3d ___ 2014 WL 2986668

Save the Plastic Bag Coalition v. County of Marin

- *Court upholds Marin County's reliance on Class 7 and Class 8 categorical exemptions for adoption of ordinance banning plastic bags and imposing fee on paper bags for most retailers in unincorporated area*
  - Class 7 and 8 exemptions apply to actions taken by "regulatory agencies" as authorized by state law or local ordinance to assure the maintenance, restoration, enhancement, or protection of (i) "a natural resource" (15307) and (ii) "the environment" (15308)

Save the Plastic Bag Coalition (cont.)

- California Supreme Court decision in *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155 does not mandate an EIR for County of Marin ordinance
  - In upholding the negative declaration for Manhattan Beach's plastic bag ban in part because the lead agency was a "small" city, the Supreme Court did not intend to prejudge future cases involving different administrative records
    - Each CEQA case must be judged on its own administrative record
  - The Supreme Court did caution against an overreliance on "life cycle studies" and directed agencies to focus on "actual impacts attributable to the project at hand"

Save the Plastic Bag Coalition (cont.)

- A county can be a "regulatory agency" for purposes of the Class 7 and Class 8 exemptions
  - Section 7 of Article 11 of the California Constitution gives counties (and cities) the power to "make or enforce within [their] limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws"
    - Although ordinances are always "legislative," they may also constitute "regulations"

Save the Plastic Bag Coalition v. City and County of San Francisco

Court upholds San Francisco's reliance on Class 7 and Class 8 categorical exemptions for adoption of ordinance that

- *extends existing restrictions on use of noncompostable plastic bags from just large supermarkets and retail pharmacies to all retail stores*
- *requires stores to charge 10 cents for single-use checkout bags made of either compostable material or paper with 40% recycled content*
- *institutes outreach and education program for stores and customers*

Save the Plastic Bag Coalition (cont.)

California Supreme Court's decision in *Save the Plastic Bag Coalition v. City of Manhattan Beach* does not generally prohibit the use of categorical exemptions for plastic bag bans

- The case does not mandate "comprehensive environmental review" for plastic bag ban in any city larger than Manhattan Beach
- Petitioner's attempt to read so much into the *Manhattan Beach* case "stretches the bounds of reasonable advocacy"

Save the Plastic Bag Coalition (cont.)

- Class 7 and 8 exemptions apply to actions taken by "regulatory agencies" as authorized by state law or local ordinance to assure the maintenance, restoration, enhancement, or protection of (i) "a natural resource" (15307) and (ii) "the environment" (15308)

Save the Plastic Bag Coalition (cont.)

- Court rejects the contention that the City's "legislative action" approving ordinance was not a "regulatory action" within the meaning of the two exemptions
  - Section 7 of Article 11 of the California Constitution gives counties and cities the power to "make or enforce within [their] limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws"
  - Although ordinances are always "legislative," they may also constitute "regulations"
  - The same Court of Appeal District (First) had previously reached the same conclusions in *Save Plastic Bag Coalition v. County of Marin* (2013) 218 Cal.App.4th 209

Save the Plastic Bag Coalition (cont.)

- City's use of exemptions was not defeated by any "reasonable possibility" that the ordinance will have a significant effect on environment due to "unusual circumstances" (see Guidelines, § 15300.2(c))
  - Categorical exemptions are *not* subject to the rule, applicable to the "general" or "common sense" exemption (Guidelines, § 15061(a)(3)), requiring *certainty* of the absence of significant effects
  - Even assuming that categorical exemptions can negated by any "fair argument," Coalition has made no such fair argument

Save the Plastic Bag Coalition (cont.)

Court *rejects* Petitioner's arguments that circumstances relating to ordinance were "unusual" because

- City is visited by 15.9 million tourists annually and hundreds of thousands of commuters daily
  - The Administrative Record did *not* support Coalition's claim that commuters would never bring reusable bags with them
- Paper and compostable bags are purportedly worse environmentally than plastic bags
  - Supreme Court in *Manhattan Beach* cautioned agencies against relying on "life cycle" studies for products in assessing impacts of local ordinances
  - In any event, the San Francisco ordinance is not a plastic bag ban but a "Checkout Bag ordinance" intended to reduce all single-use bags

Save the Plastic Bag Coalition (cont.)

- Portion of ordinance requiring 10-cent fee for paper or compostable single use bags was not impermissible "mitigation" built into project to qualify for categorical exemptions
  - Fee concept was not a project change intended to substantially lessen or avoid significant impacts, but was "always an *integral part*" of ordinance

Save the Plastic Bag Coalition (cont.)

- This conclusion is supported by *Wollmer v. City of Berkeley* (2013) 193 Cal.App.4th 1329, which treated land dedication for turn lane as integral part of project design from its inception
- In contrast, *Salmon Protection and Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, had disallowed a categorical exemption where the project proponent took "subsequent actions" to "mitigate or offset . . . alleged adverse environmental impacts"

San Francisco Beautiful v. City and County of San Francisco

- *Court upholds City's reliance on Class 3 categorical exemption for approval of AT&T's "Lockspeed Project," which would upgrade existing fiber optic system by installing 726 new metal "utility cabinets" on sidewalks throughout the City*

San Francisco Beautiful (cont.)

- "Class 3" categorical exemption consists of:
  - *construction and location of limited numbers of new, small facilities or structures*
  - *installation of small new equipment and facilities in small structures*
  - the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure
- Examples include "[w]ater main, sewage, electrical, gas, and other *utility extensions, including street improvements*, of reasonable length to serve such construction"

(CEQA Guidelines, § 15303)

San Francisco Beautiful (cont.)

- Court rejects Petitioner's argument that the project does not qualify for "Clause 2" of the exemption – for "installation of small new equipment and facilities in small structures"
  - Petitioner argued that Clause 2 applies only to installation of new equipment in *existing* structures, and noted that the project involves some construction of *new structures*
  - Court holds that Clause 2 does *not* limit "installation of small new equipment and facilities" to installation in *existing* small structures
    - If such a limitation had been intended, it could easily have been included; indeed Clause 3 – "the conversion of *existing* small structures from one use to another" – includes such a limitation

San Francisco Beautiful (cont.)

- City Public Works Order governing excavation permits in public rights-of-way confirms this "common-sense interpretation"
  - Order defines a "Surface-Mounted Facility" as "any Utility facility" that can "be installed, attached, or affixed . . . on a site that is above the surface of the street"
  - Order broadly defines "utility" facilities as including telecommunications and high-speed internet equipment

San Francisco Beautiful (cont.)

- Because the project qualifies under Clause 2, the court "need not consider" under Clause 1 "whether 726 utility cabinets, dispersed throughout the City's 122 million square feet of sidewalks, qualify as a '*limited number*[]' of small structures"

San Francisco Beautiful (cont.)

- City's exemption determination was *not* subject to exception "where there is a reasonable possibility that the activity will have a significant effect on the environment due to *unusual circumstances*" (CEQA Guidelines, § 15300.2(c))
  - As of late April 2014, the California Supreme Court, in pending *Berkeley Hillside* case, was still considering the proper legal test for applying this exception
  - Court of Appeal finds for the City here even under the most lenient possible standard, by which exemption would be defeated by any "fair argument" that impacts may be significant

San Francisco Beautiful (cont.)

- Circumstances were not "unusual"; opponents have not identified any way in which
  - "the utility boxes would create impacts that would '*differ from the general circumstances* of the projects covered by' the Class 3 exemption"
  - "any circumstances 'create an *environmental risk* that does not exist for the general class of exempt projects'"

San Francisco Beautiful (cont.)

- The City already has at least 47,994 street-mounted facilities, including
  - 1,100 bus shelters
  - 13,000 MUNI-maintained poles
  - 132 cabinets to support MUNI operations
  - 33 advertising kiosks
  - 5,800 signalized intersections
  - 25 automatic toilets
  - 113 kiosks
  - 744 news racks
  - 5,151 trolley poles
  - 21,891 street lights
  - five street light controllers

San Francisco Beautiful (cont.)

- This number (47,994) does not include
  - mail boxes
  - PG&E surface facilities
  - water department surface facilities
  - fire hydrants or
  - street trees

San Francisco Beautiful (cont.)

- Given the urban context of the Project, Court finds no "fair argument" that pedestrian safety and aesthetic impacts may be significant
  - Opponents pointed to statements made by members of the public and elected officials suggesting that utility cabinets were unattractive and would
    - attract graffiti and public urination
    - impede pedestrians
    - block drivers' views

San Francisco Beautiful (cont.)

- "The significance of an environmental impact is . . . measured in light of the context where it occurs"
  - "[A]n activity which may not be significant in any urban area may be significant in a rural area"
- "The City is an urban environment"
  - "Its rights-of-way already contain, at a minimum, tens of thousands of structures"

San Francisco Beautiful (cont.)

- The court "recognize[s] the concern that the new cabinets will become targets for *graffiti or public urination*," but finds no fair argument related to these potential impacts
  - "[T]here is no basis to conclude people are more likely to engage in those anti-social behaviors in the presence of the cabinets than in their absence—that is, that the cabinets will bring about an increase in this behavior in a way that would rise to a significant impact"

San Francisco Beautiful (cont.)

- Under Appendix G to the CEQA Guidelines, "the relevant inquiry" with respect to *aesthetic* impacts is "whether a project would '[s]ubstantially degrade the existing visual character or quality of the site or its surroundings"
- Here, "AT&T's cabinet installations would generally be viewed in the context of the existing urban background, and the incremental visual effect of the proposed cabinets would be minimal"

San Francisco Beautiful (cont.)

- The Planning Commission concluded that
  - the utility cabinets would be dispersed
  - their impacts would be confined to their immediate vicinity and might not be noticed by causal observers
  - such facilities are common in the City's urbanized environment
  - they would not block pedestrian access or obstruct drivers' views
  - the cabinets would have a graffiti-resistant finish and a sticker with a toll-free number so AT&T could remove graffiti
- "In this context, the concerns raised by certain officials and members of the public do not rise to the level of substantial evidence of a significant impact on aesthetics or pedestrian safety"

San Francisco Beautiful (cont.)

- Court rejects argument that categorical exemption is defeated because "the cumulative impact of successive projects *of the same type in the same plac*e, over time is significant" (CEQA Guidelines, § 15300.2(b))
  - This exception did *not* require the City to consider "all similar equipment that had been or would be installed *throughout the City*"

San Francisco Beautiful (cont.)

- The limited application of the exception to "'successive projects of the same type *in the same place*'" keeps the exception from swallowing the rule
- In applying the exception, agencies are *not* required to consider the cumulative environmental impact of all successive similar projects throughout their jurisdictions, regionally, or statewide
- Plaintiffs did not point to "any evidence showing that the utility boxes will create significant cumulative impacts in the *individual locations* in which they are placed"

San Francisco Beautiful (cont.)

- The City did *not* impermissibly mitigate its way into the categorical exemption
  - "An agency may rely on *generally applicable regulations* to conclude an environmental impact will not be significant and therefore does not require mitigation"
    - City Public Works Order requirements for excavation permits in public rights-of-way, with which Project must comply, are examples of generally applicable regulations

San Francisco Beautiful (cont.)

- Memorandum of Understanding (MOU) between City and AT&T, which provided for additional public outreach,
  - Was not a basis for City's reliance on the categorical exemption
  - Did not include any "mitigation measures"

San Francisco Beautiful (cont.)

- Note the apparent trend in case law, in which the following cases on "not 'mitigating' into categorical exemptions" all read *SPAWN* (2004) in a narrow, pragmatic manner:
  - *Wollmer* (2011) (land dedication for turn lane was integral part of project design)
  - *Save Plastic Bag Coalition* (2014) (10-cent fee for paper or compostable single use bags was built into project)
  - *San Francisco Beautiful* (2014) (need to comply with generally applicable regulations was not mitigation)

North Coast Rivers Alliance v. Westlands Water District

- *Court upholds use of statutory and categorical exemptions for water districts' February 2012 approvals of two-year "interim renewal contracts" with United States Bureau of Reclamation for ongoing deliveries of up to 1.15 million acre feet annually (afa) of Central Valley Project (CVP) water*

North Coast Rivers Alliance (cont.)

- Contract renewals were subject to
  - Statutory exemption for "*ongoing projects*" that were "being carried out . . . prior to November 23, 1970" (effective date of CEQA)
    (CEQA Guidelines, § 15261, subd. (a))
  - Categorical exemption (Class 1) for "*the operation . . of existing public . . . structures[] [or] facilities*, . . . involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination"
    (CEQA Guidelines, § 15301, subd. (a))

North Coast Rivers Alliance (cont.)

IMPORTANT DATES

- *1963*: Bureau of Reclamation and Westlands enter into 40-year water service contract for up to 1,008,000 afa of CVP water annually
- *1968*: supplemental agreement increases amount to 1.15 million afa (as precisely determined later)
- *1970*: CEQA enacted
- *November 1972*: Legislature affirms legality of public agency approvals of private development permits prior to effective date of grandfathering statutes (12/5/72)
  (Pub. Resources Code, §§ 21169 and 21171)

North Coast Rivers Alliance (cont.)

IMPORTANT DATES

- *1992*: Congress enacts *Central Valley Project Improvement Act* (CVPIA), requiring Bureau of Reclamation, upon request, to renew existing water service contracts for up to 25 years, but only after preparing Programmatic Environmental Impact Statement (EIS) under National Environmental Policy Act (NEPA)
- *2007*: Reclamation and Westlands enter into three-year interim renewal contract because Reclamation has not completed EIS required by CVPIA
- *February 2012*: same parties enter into a two-year interim renewal contract, as EIS is still not done
  - At same time, "distribution districts" that receive CVP water from Westlands enter into their own two-year renewals
- *March 2012*: Petitioners file CEQA litigation

North Coast Rivers Alliance (cont.)

ONGOING PROJECT EXEMPTION

- In 1972, California Supreme Court's *Friends of Mammoth* decision holds that CEQA applies to governmental approvals of *private* projects
  - Result is contrary to common view that CEQA only applied to *governmental* projects
  - Numerous private development applications throughout California had been approved after the effective date of CEQA but prior to *Friends of Mammoth*
- Legislature responds to furor in real estate markets by passing emergency legislation grandfathering approved development permits (Pub. Resources Code, §§ 21169 and 21171)
- Resources Agency, in in Guidelines section 15261, later lays out broader approach to dealing with projects in place on CEQA's effective date

North Coast Rivers Alliance (cont.)

GUIDELINES SECTION 15261(a)

- A project being carried out by a public agency as of 11/23/70 is exempt from CEQA unless either:
  - A substantial portion of public funds allocated for the project have not been spent, and it is still feasible to modify the project to mitigate potentially adverse environmental effects, or to choose feasible alternatives, including no project; or
  - A public agency proposes to *modify the project* in such a way that the project might have a *new significant effect on the environment.*

North Coast Rivers Alliance (cont.)

- "[T]he exemption includes the situation where a public agency carries out an action today that is an *inherent part* of an ongoing project approved before CEQA took effect"
- The "key issue" is whether the action is "a *normal, intrinsic part* of the ongoing operation" of "a project approved prior to CEQA, rather than an expansion or modification thereof"
- This exemption applies to "annual water releases from dam/reservoir built prior to enactment of CEQA," despite environmental effects of fluctuating reservoir levels

(*Nacimiento Regional Water Management Advisory Com. v. Monterey County Water Resources Agency* (1993) 15 Cal.App.4th 200)

North Coast Rivers Alliance (cont.)

- Substantial evidence in record supported water districts' determinations that
  - Their contract rights were for up to 1.15 million afa by the date of CEQA enactment
  - The use of facilities and water under the interim renewal contracts would be "normal, intrinsic part[s] of the ongoing operation"
  - "[A]ssigned water [to distribution districts] was to be delivered using only existing facilities, *without any expansion*"

North Coast Rivers Alliance (cont.)

- Exceptions under section 15261(a) did *not* apply
  - "[T]he original project is funded, built-out, established in its operational parameters and continues to be carried out on those terms each year"
    - "Nothing in the record suggests that a substantial portion of funding approved prior to CEQA remains unspent"
    - "The facilities approved prior to CEQA were long ago completed, and the contractual water entitlements that were initiated prior to CEQA remain in place"
  - No "current or new proposal for a modification of the project is before us"

North Coast Rivers Alliance (cont.)

CLASS 1 CATEGORICAL EXEMPTION

- Examples of the types of projects covered by this exemption include "[e]xisting facilities of … publicly-owned utilities used to provide electric power, natural gas, sewerage, or other public utility services." (Guidelines, § 15301, subd. (b).)
- "A *water distribution system* is an existing facility for purposes of this categorical exemption." (*Turlock Irrigation Dist. v. Zanker* (2006) 140 Cal.App.4th 1047, 1065-1066.)
- "The key consideration is whether the project involves *negligible or no expansion of an existing use*."

North Coast Rivers Alliance (cont.)

- The renewal contracts qualified for this exemption:
  - The underlying project or activity authorized by the 2012 interim renewal contracts was *a continuation for two years without any changes* of the following:
    - "use of existing facilities that were constructed in the past for the purpose of receiving and delivering CVP water"; and
    - "operation of those facilities to actually receive CVP water from the Bureau and deliver that water to customers for irrigation purposes on lands within Water Districts' service areas."
  - "The amounts of CVP water at stake were the quantities specified in the chain of prior contracts between Water Districts and the Bureau"

North Coast Rivers Alliance (cont.)

- District's reliance on Class 1 exemption is not defeated by *exceptions* to exemptions found in Guidelines section 15300.2:
  - There was "no "reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances" (subd. (c))
  - There was no significant cumulative impact from "successive projects of the same type in the same place" (subd. (b))

North Coast Rivers Alliance (cont.)

- Court does not address whether "unusual circumstances" existed, but concludes that the contracts did *not* give rise to a "reasonable possibility . . . [of] a significant effect on the environment"
  - Where "a project involves ongoing operations or a continuation of past activity," the proper *baseline* for impact assessment includes "the *established levels of a particular use and the physical impacts* thereof"
    - Thus, "a proposal to continue existing operations without change would generally have no cognizable impact under CEQA"
    - "[B]aselines reflecting current conditions, including unauthorized and even environmentally harmful conditions," sometimes means that "those conditions … never receive environmental review"

North Coast Rivers Alliance (cont.)

- *Ongoing environmental effe*cts associated with delivery and use of Districts' CVP water do not come into play
  - This is true even though Petitioner raised "genuine concerns" about effects of Districts' water use on water quality and on the ecosystem of the Sacramento-San Joaquin Delta, from which Reclamation exports CVP water to Districts
  - Nothing in record, in any event, showed potentially significant effects in *two-year* period of contracts

North Coast Rivers Alliance (cont.)

- "Successive projects of the same type in the same place, over time" did *not* cause a significant cumulative impact
  - Court rejects Petitioners' concern that "*the condition of the environment is growing steadily worse*, with the combined impact of successive renewals contributing to the further significant deterioration of an already bad situation"
  - The *short-term* interim renewal contracts did *not* constitute "successive projects of the same type" within the meaning of the exception; rather, the anticipated future *long-term* contracts will become the operative "successive projects"
    - "Conceptually, the short-term, interim renewals were not new or distinct 'other' projects . . . but extensions of the original, preexisting project (i.e., the continuation on identical terms of the preceding contracts)"
    - The parties are now in a temporary, interim period between the original, long-term water service contract and the anticipated, long-term renewal thereof
    - This "brief, delaying action" was necessary under the CVPIA "to give the Bureau more time" to complete its EIS

North Coast Rivers Alliance (cont.)

- This outcome is demanded by "notions of basic fairness and reasonableness in how CEQA is applied"
  - "the exceptional brevity of each interim renewal period was not project driven, but was merely an expedient mechanism imposed by the CVPIA to assist the Bureau"
  - "it would be unreasonable to insist that Water Districts conduct a full-scale environmental review under CEQA on the occasion of each two-year interval"

Negative Declaration and Mitigated Negative Declarations

Mitigated Negative Declarations

- Basis: finding that there is no "fair argument" for significant impacts:
  - Can it be fairly argued
  - Based on substantial evidence
  - In light of the whole record
  - That a project may have a significant effect on the environment
- Supported by initial study
- And, other related studies:
  - Biological resources
  - Cultural resources
  - Traffic, etc.

Considerations for ND or MND

- Opponents must make a "fair argument":
  - Opinion must be based in fact
  - Facts must indicate a significant impact may occur:
    - Mere opposition, supposition, or opinion not enough
- Fair argument must be presented to lead agency before close of public testimony
- Fair argument based on whole of administrative record

NEGATIVE DECLARATIONS

- *San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167
- *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768

San Joaquin Raptor Rescue Center v. County of Merced

- *Planning Commission violated Brown Act by taking action on Mitigated Negative Declaration (MND) for subdivision where meeting agenda made no mention of MND*
  - Brown Act (Gov. Code, § 54954.2(a)) requires agenda, published 72 hours prior to meeting, to include "*brief general description* of each item of business" and disallows action or discussion of any item not on agenda
    - Adoption of MND was "distinct item of business"
    - Because agency actions under CEQA are of at least potential public interest, purpose of Brown Act is served by requiring disclosure of proposed CEQA action

Parker Shattuck Neighbors v. Berkeley City Council

- *Court upholds Mitigated Negative Declaration for mixed use project with 155 residential units and 20,000 s.f. of commercial space in two five-story buildings and one three story building on three parcels currently used as car dealership, of which one had formerly been used as a gas station*
  - Court rejects demand for EIR based on concern that disturbance to on-site contamination might adversely affect health of workers and future residents

Parker Shattuck Neighbors (cont.)

- History of on-site contamination:
  - 2005 "Phase 1" study identified past presence and removal of underground storage tanks and recommended more investigation to look for additional tanks
    - In 1988, prior property owner had removed 1,000 gallon gas tank from one parcel
    - In 1999, prior owner had removed 500 gallon tank from another parcel
    - In response to Fire Department concern that other tanks might still be present, Phase 1 recommended further investigation and use of ground-penetrating radar

Parker Shattuck Neighbors (cont.)

- March 2006 "Phase II" study described results of additional work done pursuant to Phase I recommendations and analyzed soil samples
  - Radar had found possible additional tank under sidewalk and recommended its removal, as well as concrete pad in other area that might conceal yet another underground tank
  - Soil testing found presence of VOCs but not at levels exceeding RWQCB "environmental screening levels"
  - Authors recommended additional soil and water testing under concrete pad in search of petroleum residue and possible underground tank

Parker Shattuck Neighbors (cont.)

- Supplemental Phase II study found contaminants in amounts exceeding screening levels, but concluded that that hydrocarbon levels were not likely to require clean-up and that arsenic and cobalt were probably "naturally occurring"
  - Study found no contaminants in amounts that exceeded screening levels for groundwater not used for drinking water
  - Study determined that there was no storage tank below concrete pad

Parker Shattuck Neighbors (cont.)

- In April 2006, the storage tank under sidewalk and 75 tons of soil were removed, and site was placed on State's "Cortese List" of contaminated sites
- In January 2007, Regional Board issued closure letter, but site remained on Cortese List even though the "case" was "closed"

Parker Shattuck Neighbors (cont.)

- MND for project found no significant impacts relating to toxics, reasoning that, although site was still on Cortese List, the City and Regional Board had determined that past analyses and remediation efforts had eliminated possible hazards to the public and the environment
- Project opponents' expert opined that EIR was necessary to assess potential health threat to workers and future residents

Parker Shattuck Neighbors (cont.)

- Court found that comments from opponents' expert did not rise to level of substantial evidence supporting fair argument that project may have significant effects
  - The mere fact that site was on Cortese List was not sufficient evidence to trigger EIR: sites sometimes stay on list even after completion of remediation
  - EIR was not required simply because CEQA disallows categorical exemptions for sites on list (Pub. Resources Code, § 21084, subd. (d))

Parker Shattuck Neighbors (cont.)

- An expert critique of the City's methodology and demands for further investigation were not enough to trigger EIR
  - Opponents' expert recommended additional "vapor intrusion study" to assess whether remaining contamination might adversely affect future residents
  - Opponents' expert also noted that workers could be exposed to VOCs through dermal contact, and urged additional investigation
  - "Fair argument" triggering EIR requires evidence on ultimate question of whether impacts may be significant, not just "suggestion[s] to investigate further"
  - Opponents' expert never addressed why levels below RWQCB screening levels might pose health effects where the water will not be drunk

Parker Shattuck Neighbors (cont.)

- Court chose not to squarely address validity of controversial line of court cases holding that CEQA is not concerned with impacts of "the environment" on "projects," but rather is only concerned with impacts of projects on the environment)
  - Here, existing contamination on site *would* be disturbed, resulting in an impact of the project on the environment (even though the impact was not significant)

Parker Shattuck Neighbors (cont.)

- In any event, even if workers and residents might be adversely affected, CEQA is concerned with effects on "the environment of persons in general," not effects on "particular persons"
  - "it is far from clear that adverse effects confined only to the people who build or reside in a project can ever suffice to render significant the effects of a physical change"
  - (This last issue is before California Supreme Court in *CBIA v. BAAQMD*)

Environmental Impact Reports

EIRs

- Project Description: whole of the action
- Reasonable Range of Alternatives:
  - Based on meeting most of project objectives (underlying purpose)
  - Substantially avoid or reduce at least one of proposed project's potential significant impacts
  - Potentially feasible
- Environmental Setting: Baseline
- Impact Analysis: Rationale for significance determinations
- Direct, Indirect, Cumulative (considerable contribution), and Growth Inducement Impacts
- Feasible Mitigation:
  - May be outside agency's jurisdiction
  - Cannot be deferred without performance standards

EIRs

- Final EIR must respond in writing to all comments received during review period:
  - May respond in writing to later comments
  - Must consider all comments
- Generally, the most intensive environmental review under CEQA:
  - Related studies usually in EIR's appendices
  - References must be made available; part of administrative record

Environmental Impact Reports

- *Neighbors for Fair Planning v. City and County of San Francisco* (2013) 217 Cal.App.4th 540
- *Save Panoche Valley v. San Benito County (*2013) 217 Cal.App.4th 503
- *Masonite Corporation v. County of Mendocino* (2013) 218 Cal.App.4th 230
- *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439
- *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832
- *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1
- *California Clean Energy Committee v. City of San Jose* (2013) 220 Cal. App.4th 1325

ENVIRONMENTAL IMPACT REPORTS (CONT.)

- *South County Citizens for Smart Growth v. County of Nevada* (2013) 221 Cal.App.4th 316
- *Lotus v. Dept. of Transportation* (2014) 223 Cal.App.4th 645
- *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173
- ~~*Center for Biological Diversity v. Department of Fish and Wildlife*~~
- *Sierra Club v. County of Fresno* (2014) 226 Cal.App.4th 704
- *Citizens For a Sustainable Treasure Island v. City and County of San Francisco* (2014) ___ Cal.App.4th___ [2014 WL 3057986]

Neighbors for Fair Planning v. City and County of San Francisco

- *Court upholds EIR and findings for 68,206 sf mixed-use project consisting of 48 affordable housing units, community center, gymnasium, and program space for serving at-risk teens*
  - City did not "preapprove" project prior to certifying Final EIR
  - The EIR was legally adequate with respect to discussion of baseline conditions and scope of alternatives
  - Findings rejecting "Code Compliant Alternative" were supported by substantial evidence

Neighbors for Fair Planning (cont.)

- City did not violate principles from California Supreme Court's 2008 *Save Tara* decision regarding "preapproval" when:
  - City loaned project applicant $788,484 to cover "predevelopment activities"
  - One supervisor *proposed* an ordinance to allow increased height in zoning district and to increase size of density bonus
  - Staff worked with applicant to shape project design
  - One supervisor publicly advocated project

Neighbors for Fair Planning (cont.)

- Predevelopment loan for applicant was not like the predevelopment agreement that was problematic in *Save Tara*
  - In *Save Tara*, tenants from existing structures were evicted and relocated prior to CEQA review, and City of West Hollywood would have been out $475,000 if project were not completed
  - Here, San Francisco Mayor's Office of Housing verified credit-worthiness of applicant and required repayment over 55 years if project was approved or immediately if project was denied

Neighbors for Fair Planning (cont.)

- Introduction of proposed Special Use District (SUD) Ordinance did not trigger need to comply with CEQA
  - State law (Gov. Code, § 65915) requires 35% density bonus for housing projects consisting solely of low-income units
  - San Francisco allows developers to pursue additional density through ordinances creating SUDs
  - Here, SUD ordinance was *introduced* by one supervisor prior to Final EIR certification, but *approved* by majority vote after certification

Neighbors for Fair Planning (cont.)

- City and County of San Francisco did not "preapprove" project just because
  - Staff worked with applicant in shaping project
    - Such cooperation is "not unusual, suspicious, or demonstrative of preapproval" for "public-private partnerships"
  - One Supervisor publicly advocated project
    - Staff and individual agency officials may have "high esteem for a project" without nullifying EIR process; "it is inevitable that an agency proposing a project will be favorably disposed towards it"
  - Executive Director of supportive Non-Profit sent out email advocating project from sfgov.org email address
    - This mistake was acknowledged and corrected
    - ED from outside entity could not commit City to project

Neighbors for Fair Planning (cont.)

- One factual error in description of buildings near project site was not fatal to discussion of baseline conditions
  - Graphic in Draft EIR erroneously depicted two-story buildings in immediate vicinity of project as having three stories
  - Abundant other information in Draft EIR was accurate and City readily admitted its error in Final EIR
  - The error in graphic did not preclude informed decision-making and informed public participation

Neighbors for Fair Planning (cont.)

- EIR discussion of alternatives was not deficient for not including an alternative that would have relocated the applicant's existing center to an unspecified new site
  - City legitimately rejected a relocation alternative as contrary to the "fundamental objective of continuing and expanding the services the Center offers on site to its local community"
  - Applicant is NGO that is "fortunate to own" the existing site and that "lacks the "fiscal means to reasonably acquire or control an alternative site"

Neighbors for Fair Planning (cont.)

- Substantial evidence supported Board of Supervisors' findings rejecting Code Compliant Alternative as economically infeasible
  - EIR examined a Code Compliant Alternative that reduced housing units from 48 to 32, eliminating specialized housing for transitional-age youth
  - Board rejected alternative as infeasible because it would generate an annual operating deficit of somewhere between $11,937 (for a 41-unit scenario) and $77,569 (for a 25-unit scenario)
  - A City subsidy to cover shortfall ($500,000) would only come at expense of other affordable housing projects

Save Panoche Valley v. San Benito County

- *Court upholds EIR for large solar photovoltaic power plant in rural area near Fresno County currently used for low-density grazing*
  - Applicant originally proposed a 420 MW plant on 4,885 acres, but project as approved was downsized to 339 MW on 3,927 acres
  - Court also upheld County's cancellation of Williamson Act contracts in "public interest" due to statewide need for alternative energy development

Save Panoche Valley (cont.)

- EIR's impact assessment for blunt-nosed leopard lizard was adequate
  - Draft EIR was not supported by protocol surveys regarding precise locations of individual members of species
  - County responded to concern from DFG about possible "take" by requiring protocol surveys prior to construction and a 22-acre buffer zone around each location where a lizard is found

Save Panoche Valley (cont.)

- Biological resource mitigation measures for blunt-nose leopard lizard, nesting birds, and certain other species did *not* rely on "loose or open-ended" performance standards by including preconstruction survey requirements
  - No improper deferral occurs where measures require that, where preconstruction protocol surveys identify target species, (i) buffer areas of minimum sizes must be created, (ii) construction hours must be modified, or (iii) relocation of individuals must occur
  - Preconstruction surveys facilitated the completion of these mitigation goals

Save Panoche Valley (cont.)

- Substantial evidence supported mitigation for giant kangaroo rat, San Joaquin kit fox, and blunt-nosed leopard lizards
  - One off-site mitigation property, Silver Creek Ranch, had high habitat value for these species
    - It supports 95 percent of the remaining giant kangaroo rat population
    - It was specifically identified in the USFWS 1998 ESA *Recovery Plan for Upland Species of the San Joaquin Valley* as having high habitat values
    - USFWS identified Silver Creek Ranch as "critical component" of recovery of affected species
    - Applicant agreed to preserve the area in perpetuity through conservation easements

Save Panoche Valley (cont.)

  - Other measures for the giant kangaroo rat created a 389-acre habitat corridor and required conservation at a 3 to 1 ratio
    - "[M]itigation need not account for every square foot of impacted habitat to be adequate. What matters is that the unmitigated impact is no longer significant."
  - Construction mitigation required buffer zones for occupied natal dens for kit foxes and included specific guidelines for avoiding disturbance to occupied dens during construction

Save Panoche Valley (cont.)

- Mitigation for impacts to agricultural lands was proper
  - Conservation easements constitute "mitigation" as defined by CEQA
  - Mitigation here called for the creation of conservation easements and the ultimate dismantling of the project upon completion of its useful life and then restoration to agricultural conditions
  - Court rejects notion that adequate CEQA mitigation for impacts to agricultural lands must create *additional* agricultural lands to make up for lost lands
    - the "goal of mitigation" is not to "net out the impact" but to reduce it to less than significant levels
    - Mitigation also called for sheep grazing within the project site, which had some value in reducing impact even if it did not fully replace lost cattle grazing

Save Panoche Valley (cont.)

- Substantial evidence supported rejection of alternative site in Kings and Fresno Counties ("Westlands CREZ" site)
  - EIR considered alternative of using site already being leased by Westlands Water District from Westside Holdings for purpose of developing a 30,000-acre, 5,000 MW solar power plant
  - In CEQA Findings, County rejected this alternative as infeasible because
    - It could not be completed in a reasonable period of time: the applicant would have to relocate, take part in due diligence, negotiate for the land, properly design a project, and undertake another EIR
    - San Benito County could not be sure that Kings and Fresno Counties would consider approving such a project
    - Development of other site would deprive San Benito County of the tax and employment benefits of a project in San Benito County
    - Construction on the other site might be legally infeasible due to need for cooperation of Westside Holdings

Save Panoche Valley (cont.)

- In assessing feasibility, County decisionmakers had discretion to give weight to the facts that the alternative site is located in other jurisdictions and is predominantly controlled by a private party
- Substantial evidence supported the County's conclusion that the project would bring jobs and taxes to San Benito County
  - An economic impact study estimated that the project would create 771 jobs and generate $81 million in additional retail impact in the County from expenditures by project employees
- Substantial evidence supported the County's conclusion that the project "would further the state's interest in renewable energy"

Masonite Corporation v. County of Mendocino

- *Court invalidates EIR for quarry project that would mine 3.37 million tons of aggregate from 30.3 acres over 25 years on a 65-acre site with 45 acres of prime agricultural land*
  - Loss of prime agricultural land was significant, unavoidable impact
  - County erroneously assumed that off-site conservation easements did not qualify as legitimate mitigation for direct impact of loss of agricultural land

Masonite Corporation (cont.)

- County reasoned that "agricultural conservation easements" addressed only indirect and cumulative effects, and did not mitigate the direct loss of agricultural land
  - Project would cause significant unavoidable direct effects, but County (wrongly) believed it was legally infeasible to try to mitigate for them through off-site easements
  - The EIR concluded that there were no significant indirect or cumulative impacts to mitigate due to nature of surrounding properties

Masonite Corporation (cont.)

- Court concludes that off-site easements are a legitimate form of *compensatory* mitigation for the direct loss of agricultural land
  - Earlier cases have upheld the use of off-site preservation as a legitimate form of mitigation for biological resources
  - Cases upholding the rejection of easements as infeasible turned on case-specific facts regarding factors such as land costs and the economic infeasibility of agriculture in the regions surrounding project sites
  - California statutes other than CEQA (e.g., the Williamson Act) include policies favoring the preservation of agricultural land

Masonite Corporation (cont.)

- On remand, the County should also address comment from the Department of Conservation urging that in-lieu fees are also a valid form of mitigation for the direct loss of agricultural land

Neighbors for Smart Rail v. Exposition Metro Line Construction Authority

- *Court announces a new legal test for the use of a future baseline while letting stand a challenged EIR for a light rail line from Culver City to Santa Monica; EIR had used a 2030 baseline despite project beginning operations in 2015*
  - Three justices agreed with the new legal test and that the EIR was inadequate, but found that the errors were not prejudicial
  - One justice also agreed with the new test but would have ordered the EIR set aside
  - Three justices would have upheld the EIR under a more lenient legal test and did not address the issue of prejudice under the majority's legal test
  - Outcome:
    - EIR stands
    - new legal test for use of future baseline is precedent
    - discussion of prejudice is not precedent
    - majority of the court also upholds adequacy of mitigation measure for parking impacts at stations

Neighbors for Smart Rail (cont.)

- Although light rail project would commence operation in 2015, the EIR used a 2030 baseline in order to be consistent with
  - the planning horizon of the Regional Transportation Plan (RTP) of the Southern California Council of Government (SCAG)
  - approaches taken under federal transportation planning and funding statutes
- The EIR did *not* include an "existing conditions" baseline

Neighbors for Smart Rail (cont.)

- General background principles governing baseline:
  - Focus should be on *actually existing* physical conditions rather than *hypothetical* conditions under applicable permits or regulations
  - A *realistic* baseline gives the public and decisionmakers the *most accurate* picture practically possible of the project's likely impacts
  - CEQA imposes no "uniform, inflexible rule" for determining existing conditions; rather, agencies generally have discretion to decide how to measure existing conditions, subject to judicial review under a substantial evidence standard
- In this case, the Court only addressed circumstance in which lead agency has wholly omitted an existing conditions baseline in favor of a future conditions baseline

Neighbors for Smart Rail (cont.)

- Projected future conditions may be the sole baseline for impact analysis if "justified by *unusual* aspects of the project or the surrounding conditions"
- Agency has discretion to omit existing conditions analysis where its inclusion would detract from EIR's effectiveness as an informational document because such analysis would be either:
  - Uninformative ("without information value" or providing "little or no relevant information") *or*
  - Misleading
- These determinations are reviewed under a substantial evidence standard of judicial review

Neighbors for Smart Rail (cont.)

- Court disapproves *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) and *Madera Oversight Coalition, Inc. v. County of Madera* (2011) "insofar as they hold an agency may never employ predicted future conditions as the sole baseline for analysis of a project's environmental impacts"

Neighbors for Smart Rail (cont.)

- "[I]n appropriate circumstances an existing conditions analysis may take account of *environmental conditions that will exist when the project begins operations*," such as a "major change in environmental conditions that is expected to occur before project implementation"
  - An EIR for an office building could take account of a larger tower already under construction on an adjacent site
  - An EIR for a large-scale transportation project may adjust baseline to reflect "changing background conditions during the project's lengthy approval and construction period" that "are expected to affect the project's likely impacts"

Neighbors for Smart Rail (cont.)

- EIRs normally account for impacts on *future conditions* through consideration of
  - The No Project Alternative
  - Cumulative Impacts
- Nothing in CEQA precludes an agency from considering *both* existing conditions and future conditions in its primary analysis of significant impacts

Neighbors for Smart Rail (cont.)

- Exclusive reliance on future baseline raises the danger of failing to give adequate consideration to short-term impacts as well as long-term impacts (see CEQA Guidelines, § 15126.2(a))
- The mere fact that a project is intended to alleviate long-term adverse environmental conditions does not by itself justify dispensing with an existing conditions analysis
  - "Decision makers and members of the public are entitled under CEQA to know the short- and medium-term environmental costs of achieving that desirable improvement"

Neighbors for Smart Rail (cont.)

- Existing conditions can be directly measured and need not be projected through a predictive model
  - No matter how well designed models are, their product "carries the inherent uncertainty of every long-term prediction, uncertainty that tends to increase with the period of projection"
  - Existing conditions are more accessible to decision-makers and members of the public, who may not be "technically equipped to assess a projection into the distant future"

Neighbors for Smart Rail (cont.)

- This EIR did not adequately justify its reliance on a 2030 baseline, representing conditions 15 years after commencement of the project
  - The EIR neglected any consideration of impacts that might occur during the first 15 years of operation
  - The fact that population, traffic, and air emissions are expect to keep increasing through 2030 was not enough by itself to justify foregoing a shorter-term analysis
  - Nor were projected ridership increases between 2015 and 2030 a sufficient basis for omitting an analysis of earlier conditions
- Even so, the EIR stands because three justices thought these errors were not prejudicial and three other justices thought the EIR was adequate under a different legal test they would have applied

Neighbors for Smart Rail (cont.)

- Court upholds EIR's finding that parking impacts around rail stations would be mitigated to less than significant levels by a combination of actions by the lead agency and responsible agencies
  - Mitigation at issue committed the Los Angeles County Metropolitan Transportation Authority (MTA), in the event of a parking shortage, to assist responsible local jurisdictions to establish a permit parking program with signs for which MTA would pay
  - In approving project, the Expo Authority found both (i) that it would adopt mitigation for this impact and (ii) that other agencies can and should adopt mitigation (see CEQA Guidelines, § 15091, subds. (a)(1) & (a)(2))

Neighbors for Smart Rail (cont.)

- Both of these findings were supported by substantial evidence and were proper under CEQA
  - "While the Expo Authority and MTA cannot guarantee local governments will cooperate to implement permit parking programs or other parking restrictions, the record supports the conclusion that these municipalities 'can and should' . . . do so"
  - Opponents' "speculation a municipality might not agree to a permit parking program – which MTA would pay for and which benefit the municipality's own residents – is not sufficient to show the agency violated CEQA by adopting this mitigation measure"

Friends of Oroville v. City of Oroville

- *Court sets aside EIR for Walmart replacement and relocation project because of inadequate analysis of greenhouse gas (GHG) emissions*
  - Project included the shutdown of an existing Wal-Mart about half the size of the proposed new 200,000 square foot store
  - Court found that the City did not properly apply a threshold of significance premised on consistency with statewide GHG emission reduction efforts under AB 32
  - Court upheld both
    - EIR baseline description of hydrological conditions
    - Mitigation measure addressing stormwater runoff rates

Friends of Oroville (cont.)

- EIR used a GHG significance threshold of significantly hindering or delaying California's ability to meet AB 32 reduction targets
- EIR concluded that GHG impacts were less than significant because
  - project features and mitigation measures required energy conservation, air pollution reduction, landscaping measures, and the like
  - the project's percentage contribution to statewide GHG emissions was miniscule (0.003 percent) and thus not cumulatively considerable

Friends of Oroville (cont.)

- The use of a GHG significance threshold based on consistency with AB 32 efforts was upheld in *Citizens for Responsible and Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327
- That case demonstrates how the City of Oroville misapplied the proper approach in this case; the City erred here by
  - "applying a meaningless, relative number to determine insignificant impact" (contrary to the rejection of a "de minimis" approach to impact assessment in *CBE v. Resources Agency* (2002) 103 Cal.App.4th 98)
  - failing to ascertain the existing Wal-Mart's GHG emissions
  - failing to ascertain the impact on GHG emissions from mitigation measures applied to the new Wal-Mart

Friends of Oroville (cont.)

- Proper approach would be as follows:
  - Calculate the statewide GHG percentage reductions required under AB 32 (e.g., about a 30% reduction from projected 2020 "Business as Usual" (BAU) emissions levels or about a 10% reduction from actual 2010 emissions)
  - Calculate the BAU emissions of the proposed new store
  - Calculate the BAU emissions of the existing Wal-Mart to be closed
  - Subtract the BAU emissions from the store being closed from the BAU emissions from the proposed new store, to get a total net BAU number for the proposed project
  - Calculate the GHG emissions that would avoided by the proposed mitigation measures or energy conservation or GHG-reducing features not assumed in BAU scenario
  - Subtract from the "net" BAU number for the proposed project the GHG emissions reductions expected from mitigation measures and other energy saving or GHG-reducing measures
  - Determine whether percentage of emissions reduced by these measures and features is at least as great as the statewide percentage reduction required under AB 32 (e.g., 30% from projected 2020 BAU levels or 10% from actual 2010 levels)

Friends of Oroville (cont.)

- Court rejects Wal-Mart's argument for why City properly applied the threshold
  - Wal-Mart placed undue emphasis on the project's consistency with CARB's AB 32 *Scoping Plan*
    - Although the Scoping Plan lays out a roadmap for the State as a whole to comply with AB 32, the only measures applicable to the proposed project would not address the 68% of the project's GHG emissions coming from transportation sources
  - Wal-Mart's claim that the EIR shows that a superstore "may reduce multiple and out-of-town trips by the City's residents" is contradicted by other statements in the EIR indicating that the project will not result in significant changes in vehicle miles traveled (VMT)

Friends of Oroville (cont.)

- Court rejects challenge to baseline description of hydrological conditions
  - EIR did not fail to provide sufficient information to determine feasibility of requirement that future *Drainage Plan* avoid an increase in runoff rates
    - Geological investigation included in EIR analyzed water percolation rates through existing mining tailings on site
    - Mitigation Measure HYD-4 required formulation of *Drainage Plan* that must
      - further address percolation rates through tailings
      - ensure that the rate of runoff would be no greater than occurs under existing conditions

Friends of Oroville (cont.)

- EIR did not fail to include adequate information about baseline water quality conditions
  - Petitioners were concerned with Mitigation Measures HYD-2a, which required a *Stormwater Management Plan* with a minimum of 11 pollution prevention measures intended to prevent polluted water from leaving the project site
  - Final EIR response to comment described pollution control measures in HYD-2a as being "widely employed and demonstrated to be effective means at controlling and preventing pollution from entering downstream waterways"
  - EIR noted that the area affected by project included no water bodies considered impaired under the Clean Water Act, and that no Total Maximum Daily Loads (TDMLs) were in effect for these water bodies
  - Mitigation Measure HYD-4 will address existing runoff as part of Drainage Plan

Friends of Oroville (cont.)

- Mitigation Measures HYD-2a and HYD-4 were not invalid for deferring the formulation of specific mitigation strategies
  - Both measures included adequate performance standards
    - MM HYD-2a committed the project to preventing polluted runoff from leaving the project site and included 11 specific measures and best management practices of proven effectiveness
    - MM HYD-4 committed the project to preventing an increase in the rate of runoff compared with existing conditions, thereby protecting adjacent properties during storm events

San Diego Citizenry Group v. County of San Diego

- *Court upholds EIR for "Tiered Winery Zoning Ordinance" intended to streamline approvals of wineries in eastern San Diego County*
  - Ordinance allowed "by-right" approvals for "boutique wineries" and "wholesale limited wineries" (producing up to 12,000 gallons per year)

San Diego Citizenry Group (cont.)

- Board of Supervisors was not required to make a "policy determination" regarding the project objectives in the Draft EIR before county staff could invoke them in assessing the feasibility of mitigation measures in the Final EIR
  - Board directed staff to develop a "tiered winery ordinance" including, among other things, "By-Right Boutique Wineries"
  - Board properly delegated to staff the task of preparing the EIR, including the project objectives required by CEQA Guidelines section 15024(b)
  - See also CEQA Guidelines § 15025(a)(3) (allowing delegation of task of preparing EIR) (not mentioned by court)

San Diego Citizenry Group (cont.)

- County staff properly applied project objectives favoring regulatory streamlining in formulating and assessing the feasibility of mitigation measures
  - "CEQA does not restrict an agency's discretion to identify and pursue a particular project designed to meet a particular set of objectives"
  - Here, staff properly developed 11 "avoidance measures" that, if satisfied, would allow approval "by right"
    - Measures addressed environmental impacts by limiting the size of qualifying wineries and the kinds and scope of permitted activities

San Diego Citizenry Group (cont.)

- Despite the project's significant unavoidable impacts, the County did not violate CEQA by failing to adopt additional mitigation measures inconsistent with project objectives
  - In this context, "feasibility" encompasses "desirability" to "the extent that desirability is based on a reasonable balancing of the relevant economic, environmental, social, and technological factors"
  - "CEQA does not, indeed cannot, guarantee that [an agency's] decisions will always be those which favor environmental considerations."

San Diego Citizenry Group (cont.)

- The County acted within its discretion in rejecting a proposed traffic mitigation measure that would have required winery proponents on private roads to obtain "maintenance agreements" with neighbors sharing private roads
  - Requiring agreement with neighbors was inconsistent with purpose of creating "by-right" standards for approval, as neighbors could exercise de facto veto power over project
  - Mitigation was achieved through different strategies, such as limiting size of events, operating hours, and size of participating vehicles
  - County was not required to state "legitimate reason" for "repealing" such a requirement because the County had previously repealed an earlier *different* version of the Ordinance that had contained such a requirement; the measure was no longer in effect at time of EIR preparation

San Diego Citizenry Group (cont.)

- Court finds that the EIR adequately predicted the probable general locations of future wineries
  - County's predictions were based in part on
    - the locations of current vineyards and wineries
    - the results of questionnaires sent to 26 existing wholesale limited wineries regarding their future plans
    - conclusions of traffic study, which
      - identified specific roadways in specific communities where grape production already exists or is likely to occur, using information from County General Plan and SANDAG
      - used trip generation data based on existing wineries in eastern San Diego County

San Diego Citizenry Group (cont.)

- EIR adequately addressed water supply impacts
  - The California Supreme Court's 2007 *Vineyard Area Citizens* decision "does *not* require . . . that the FEIR for a zoning amendment predict the '*total effect on water demands*' in the Project area to adequately address water impacts"
    - A "conceptual EIR, such as one for a General Plan Amendment," satisfies *Vineyard* by
      - identifying the likely source of water for new development
      - noting the uncertainties involved
      - discussing measures being taken to address the situation in the foreseeable future
  - The EIR acknowledged, "as it must," that "there was no way to know how many by-right wineries might develop"

San Diego Citizenry Group (cont.)

- Here, the FEIR did all of the following:
  - Discussed water sources
  - Identified the uncertainties involved
  - Addressed measures being taken through regional water planning
  - Analyzed the use of water by existing grape growers and winery operators and extrapolated from this information
  - Projected declines in agricultural use of water due to its scarcity and costs
  - Noted that a project goal was to encourage crops, such as grapes, that use less water
  - Considered information from other counties regarding the magnitude of impacts that could result from the creation of wineries by right

San Diego Citizenry Group (cont.)

- Court rejects argument that the EIR was misleading in suggesting that future grading permit approvals could lead to mitigation of all kinds of environmental impacts
  - Although the FEIR acknowledged that its discretionary grading ordinance was "possibly a source of limited environmental review," the FEIR also recognized that the grading permit process "does not mitigate all impacts," and that "mitigation may not be feasible" even for projects requiring grading permits

San Diego Citizenry Group (cont.)

- Court rejects argument that the Board's Statement of Overriding Considerations must be overturned because "the FEIR is so deficient that it does not provide a basis for making these findings"
  - This case is not one where "the EIR so severely understated" impacts that the decision-makers had "no opportunity to deal with the true severity and significance" of the project's impacts
  - Rather, the FEIR
    - Relied on conservative assumptions
    - Found significant impacts
    - Adequately apprised the decision maker of the severity of those impacts

San Diego Citizenry Group (cont.)

- The trial court erred in requiring the losing petitioner to bear $6,067.94 for the cost of preparing a transcript of a Planning Commission meeting
  - The CEQA statute specifying administrative record contents (Pub. Resources Code, § 21167.6(e)) only mandates inclusion of planning commission transcripts where they were presented to decision-makers (city councils or boards of supervisors) *prior* to their action on the project
  - Here, the transcripts were made *after* project approval

California Clean Energy Committee v. City of San Jose

- *Court of Appeal overturns trial court decision dismissing challenge to EIR for San Jose 2040 General Plan; case may proceed to merits*
  - Petitioner's failure to file an administrative appeal of Planning Commission action certifying Final EIR was not fatal to case
    - Court of Appeal would not enforce City requirement that Planning Commission certify EIR when making advisory recommendations on projects requiring legislative approvals by City Council
      - *As decisionmaking body, City Council must certify Final EIR; Planning Commission may only offer advisory recommendation*

California Clean Energy Committee (cont.)

- CEQA Guidelines section 15090 (certification)
  - Certification consists of three elements:
    - Final EIR has been completed in compliance with CEQA
    - Final EIR was presented to and reviewed and considered by decisionmaking body
    - Final EIR reflects lead agency's independent judgment
  - Where an elected body such as a city council is or may be the final decisionmaker for a local project, local procedures must provide for an appeal to the elected body of a certification decision made by a lower nonelected body such as a planning commission

California Clean Energy Committee (cont.)

- CEQA Guidelines section 15025 (intra-agency delegation):
  - Prohibits an agency decisionmaking body from delegating the task of "[r]eviewing and considering a final EIR"
  - Provides that "an advisory body such as a planning commission" shall "review and consider the EIR," in "draft or final form," in "mak[ing] a recommendation on a project"

California Clean Energy Committee (cont.)

- San Jose Ordinance requires Planning Commission to certify Final EIRs for all projects requiring EIRs
  - Commission "certification" consists of conclusion that Final EIR is "complete and conforms to the requirements of CEQA" (legal adequacy)
  - Ordinance does not specifically require Commission to determine that the Final EIR reflects the City's independent judgment or to state that the Commission has reviewed and considered the Final EIR

California Clean Energy Committee (cont.)

- Ordinance does not distinguish between projects for which Commission recommendations are merely advisory (those requiring *legislative* actions by City Council) and projects for which Commission actions are final absent administrative appeals to City Council (those requiring only *quasi-adjudicatory* approvals)
- Appeals to City Council must be filed within three business days of Commission certification action

California Clean Energy Committee (cont.)

- Here, in approving the 2040 General Plan, the City Council certified the Final EIR again, stating that
  - The Planning Commission had determined that EIR was completed in accordance with CEQA
  - No one had appealed this determination
  - In any event, the Final EIR was in compliance with CEQA (reaffirming legal adequacy)
  - The Council had independently reviewed and analyzed the Final EIR

California Clean Energy Committee (cont.)

- City argued that its Ordinance properly delegated the task of determining the legal adequacy of Final EIRs to the Planning Commission, as long as the City Council had to review and consider Final EIRs before taking its own actions on projects, on appeal or otherwise
  - City noted that CEQA Guidelines section 15025 only expressly disallowed delegation of "reviewing and considering a final EIR" and not the other two elements of certification

California Clean Energy Committee (cont.)

- The Court of Appeal disagreed: CEQA requires that a final decisionmaking body freely consider all three required elements of certification
  - City's bifurcated approach segregated environmental review from project approval
    - Commission had no power over project but last word on legal adequacy of EIR absent an appeal
    - City Council had last word on project but no power over legal adequacy of EIR absent an appeal
  - The bifurcated approach created the danger that the City Council might be bound by a Commission determination of legal adequacy with which the Council disagreed

California Clean Energy Committee (cont.)

- Because the City's bifurcated approach violates CEQA, the Court would not enforce the Ordinance requirement of an administrative appeal of a Commission certification as applied to a project requiring legislative action
  - Petitioner was absolved of having to file an appeal
  - City Council's reaffirmation of "legal adequacy" certification determination was sufficient to effectuate proper certification of Final EIR
  - Petitioner's correspondence in administrative record preserved issues for case going forward

South County Citizens for Smart Growth v. County of Nevada

- *Court of Appeal upholds EIR for 20-acre retail project along Highway 49 to be anchored by anticipated Bel-Air Market*
  - County was not required to recirculate Draft EIR to address new "alternative" consisting of the first of two staff recommendations on the merits of the project
  - County was not required to adopt findings rejecting staff alternative as infeasible
  - Substantial evidence supported EIR's treatment of Combie Road as a "minor arterial" for purposes of determining level of service impacts despite its formal label as a "major collector"

South County Citizens (cont.)

- Original project, studied in Draft EIR, would subdivide site into ten lots
- Nine lots would be developed with 86,500 square feet of the following uses:
  - 59,800 sf Bel-Air
  - Two retail buildings (13,200 sf and 6,500 sf)
  - Two 3,500 sf drive-through fast food restaurants
  - 3.26 acres of wetlands with 25-foot buffer
  - Parking stalls
- Project would create 5.07-acre remainder parcel for Tintle family, allowing light industrial and office uses
  - Such uses were not part of "project" proposed by developer, Katz Kirkpatrick Properties
  - Parcels could only be developed after Tintles filed application(s) and completed public process

South County Citizens (cont.)

- Draft EIR Alternatives:
  - *Alternative 1*: No Project – site left in current condition
  - *Alternative 2*: "Woodridge Court Right-in, Right Out": left-turns into and out of project site would be precluded along Highway 49 frontage
  - *Alternative 3*: "Business Park Land Use": site would develop under current general plan designations
  - *Alternative 4*: "Redesign/Reduced Density Alternative" (79,00 sf):
    - Eliminate proposed 6,500 sf building to create 50-foot buffer from wetland conservation area
    - Relocate drive-through restaurants and commercial building to increase buffer with adjacent residential areas

South County Citizens (cont.)

- After completing the Final EIR, both County staff and the Planning Commission recommended that the Board of Supervisors approve a modification of Alternative 4 in which
  - Overall development was capped at 75,000 sf
  - Open Space was increased to 10 acres by eliminating future development prospects on the Tintle remainder parcel
  - The wetland buffer was increased from 25 to 100 feet
  - The two fast food restaurants were eliminated

South County Citizens (cont.)

- In response, the developer modified project:
  - Development on developer's lots was capped at 75,710 sf
  - Two fast food restaurants were eliminated
  - Tintle remainder parcel got Business Park designation on 3.03 acres and Office Professional on .078 acre, with total future development cap of 26,000 sf
  - Wetland buffer was increased to 50 feet, and an additional 20-foot buffer was created for a total buffer of 70 feet
  - Six acres of open space were preserved
- This version of the project was endorsed by staff, recommend by Planning Commission, and approved by the Board of Supervisors

South County Citizens (cont.)

- The County was not required to recirculate some or all of the Draft EIR to include the first staff recommendation as a new alternative
  - Petitioner did not challenge the adequacy of the range of alternatives in the Draft EIR, but only contended that the new alternative triggered recirculation as a matter of law
  - Substantial evidence supported the Board of Supervisors' implied finding that the staff recommendation did not amount to "significant new information" triggering recirculation

South County Citizens (cont.)

- CEQA Guidelines section 15088.5(a)(3) sets forth the trigger for recirculation due to a possible new alternative (or mitigation measure)
  - It must
    - Be feasible;
    - Be considerably different from others previously analyzed; and
    - Clearly lessen the significant environmental impacts of the project; and
  - The project's proponents must decline to adopt it

South County Citizens (cont.)

- Agencies need not make express findings on why potential new alternatives did not trigger recirculation
  - Certification of Final EIR represents implied finding that recirculation was not required

South County Citizens (cont.)

- Challenger "bears the burden of proving a *double negative*," that is, that the agency's decision *not* to recirculate is *not* supported by substantial evidence
  - Challenger thus must prove this double negative as to *all* of the following implied determinations:
    - The alternative is not feasible;
    - The alternative is not considerably different from others previously analyzed; and
    - The alternative would not clearly lessen the significant environmental impacts of the project; and
  - The record must show that "the project's proponents declined to adopt" the new alternative

South County Citizens (cont.)

- Here, the Petitioner did not meet its burden to prove the double negative on all of the required elements
  - Petitioner failed to explain with reasoned analysis why increased open space in the first staff recommendation made it "considerably different" from Alternative 4 in Draft EIR
  - Petitioner also failed to set forth evidence favorable to the County on this point, and thus waived its claim
  - Petitioner did not provide any analysis to support its claim that only "potential feasibility," as opposed to "actual feasibility," is necessary to trigger recirculation
  - Petitioner provided no analysis as to why reduced air pollution due to increased open space would clearly lessen cumulative air quality impacts in light of the significance thresholds applied by Nevada County

South County Citizens (cont.)

- The Board of Supervisors was not required to address the feasibility of the first staff recommendation in its CEQA findings
  - Nothing in CEQA or the Guidelines requires an agency decisionmaker to address in findings a potential new alternative proposed after the final EIR is prepared
  - The Board's CEQA Findings appropriately focused on the Alternatives included in the EIR

South County Citizens (cont.)

- Court rejects Petitioner's argument that County improperly relied on future improvements to Combie Road in concluding that impacts of modified project on road would be less than significant
  - County's traffic consultant concluded that Combie Road functioned more like a free-flowing "minor arterial" than a "major collector" in which direct driveway access impedes flow
    - Road functioned as a thoroughfare between Highway 49 and Lake of the Pines Community
    - Only the area near Highway 49 was slowed by driveway access
    - The County's 1996 General Plan anticipated the change in status from "major collector" to "minor arterial"
    - County had plans to submit to Caltrans a change in the official designation to "minor arterial"
    - County had fully funded plans to widen Combie Road to increase capacity

South County Citizens (cont.)

- Petitioner misinterpreted the administrative record in contending that the County's analysis improperly assumed that unapproved future improvements would be needed for Combie Road to function as a minor arterial
  - "Although the County intends to widen Combie Road and the project is fully funded," this fact merely supported "the conclusion that Combie Road functions more as a minor arterial than a major collector"
  - In any event, the County was entitled to assume "that a previously planned and funded expansion of Combie Road would occur"
    - "A public agency can make reasonable assumptions based on substantial evidence about future conditions without guaranteeing that those assumptions will come true"

Lotus v. Department of Transportation

- *Court sets aside EIR for highway construction project on one-mile segment of US 101 passing through Richardson Grove State Park*
  - EIR failed "to properly evaluate the significance of impacts on the root systems of old growth redwood trees adjacent to the roadway"

Lotus v. Caltrans (cont.)

- The existing stretch of 101 was curvy and narrow, and lacked adequate shoulders to allow use of facility by standard-sized trucks
- Project involved "minor road adjustments, curve corrections, and shoulder widening," as well as "culvert improvements and repaving the roadway"
- Project required placement of "fill" of up to 3.5 feet on top of root zones of 41 redwood trees
- Six redwoods – but no old growth trees – would be removed
- Overall "hard surface" within structural root zone would increase by five percent

Lotus v. Caltrans (cont.)

- The EIR described numerous "avoidance, minimization and/or mitigation measures" that were "incorporated into the project" to mitigate "expected impacts," including
  - Restorative planting on 0.56 acre of former roadbed
  - Increased invasive plant removal as "offset"
  - Hand excavation below finished grade
  - Use of pneumatic excavator for excavation within root zone
  - Reduced pavement thickness
  - Special watering rules
  - Replanting with native plants
  - Special erosion control measures to "promote air circulation" within new embankments

Lotus v. Caltrans (cont.)

- EIR concluded that, with these techniques, no significant impacts would result
  - EIR did not include any "standard of significance" for assessing impacts to root zone
  - EIR did not assess whether, absent the techniques, impacts would have been significant
  - EIR simply assumed that techniques would be effective
  - Techniques were not described as mitigation measures either in the Initial Study or in the EIR text

Lotus v. Caltrans (cont.)

- "By compressing the analysis of impacts and mitigation measures into a single issue, the EIR disregards the requirements of CEQA"
  - "Simply stating that there will be no significant impacts because the project incorporates 'special construction techniques' is not adequate or permissible"
  - Caltrans' approach "precludes both identification of potential environmental consequences arising from the project and also thoughtful analysis of the sufficiency of measures to mitigate those consequences"

Lotus v. Caltrans (cont.)

- The EIR should have discussed the significance of the project's impacts "apart from" the mitigating techniques
- The EIR thus failed "to consider whether other possible mitigation measures would be more effective"

Lotus v. Caltrans (cont.)

- In describing legal requirements relating to formal mitigation measures, court notes the requirement for "enforceable monitoring program" (citing CEQA Guidelines, § 15091(d))
  - Additional lesson from case: include all mitigating "project features" or "avoidance and minimization measures" in Mitigation Monitoring and Reporting Program

California Clean Energy Committee v. City of Woodland

- *Court sets aside approvals of, and EIR for, "Gateway II" regional shopping center on undeveloped agricultural land on periphery of Woodland; court finds problems with*
  - *Mitigation measures for urban decay*
  - *Findings rejecting Mixed-Use Alternative*
  - *Analyses of energy impacts from*
    - *Transportation fuel use*
    - *Project operation*

California Clean Energy Committee (cont.)

BACKGROUND

- Earlier phase – Gateway I – was approved in 2006 and is up and running
- Gateway II project requires general plan amendment, prezoning, and annexation
- Original application was for 234 acres
- Final approved project was limited to 340,000 sf of commercial space on 61.3 acres

California Clean Energy Committee (cont.)

- EIR found that project would cause significant and unavoidable *urban decay* impacts (physical deterioration) in Downtown Woodland, East of Downtown, and East of I-5
  - Though project tenants would not directly compete with Downtown retailers, the "lack of overall demand for additional retail may make it financially infeasible for public or private investors to make the needed capital investments to support additional retail suited for Downtown"

California Clean Energy Committee (cont.)

- In the long-term, however, the Project "could benefit" Downtown
  - Project will attract more regional shoppers to Woodland, giving Downtown an opportunity to capture some of them
  - Project will generate general fund revenues supporting investment in Downtown

California Clean Energy Committee (cont.)

- Despite finding impacts to be significant and unavoidable, EIR proposed, and City Council adopted, five mitigation measures to "combat urban decay"; these required
  - Land use controls
  - Preparation of future Market Studies and Urban Decay analyses
  - Contributions to funding of Retail Strategic Plan for existing suburban strip centers and Implementation Strategy for Downtown Specific Plan
  - Coordination with owner of the County Fair Mall to develop a "Strategic Land Use Plan" for that property

California Clean Energy Committee (cont.)

- Only the first of these measures – land use controls – passed muster under CEQA
  - With one exception, "the adopted mitigation measures are insufficient to ensure the City will take *concrete, measurable actions* to counteract the urban decay expected to result"

California Clean Energy Committee (cont.)

- Court upholds Mitigation Measure 4.11-2(a), which requires the Project's primary retail uses to be "regional" (i.e., of a type that won't compete with Downtown)
  - This measure is "permissible" as it would "help" address urban decay, "albeit not enough to avoid the significant urban decay impact"
  - But the measure "does not, by itself, constitute adequate mitigation of the anticipated urban decay"

California Clean Energy Committee (cont.)

- Court rejects Mitigation Measure 4.11-2(b), which requires developer, when applying for a site-specific development, to submit a "*market study*" and "*urban decay analysis*" for review and approval by Community Development Department
  - Measure improperly "cede[s] responsibility" to the developer for "studying an environmental impact"
  - Measure fails "to require specific mitigation actions to alleviate urban decay"

California Clean Energy Committee (cont.)

- "Under CEQA, a public agency cannot charge a developer with the responsibility to study the impact of a proposed project"
  - Environmental documents must reflect "independent judgment" of lead agency
- Mitigation Measure 4.11-2(b) does not include
  - "specific mitigation measures"
  - "standards for the community development department to adhere to in deciding whether the developer-proposed mitigation is sufficient"
  - "criteria for success"

California Clean Energy Committee (cont.)

– Mitigation Measure 4.11-2(b), however, did *not* constitute piecemealing
  - EIR "had the hallmarks of a program EIR intended to address the cumulative impacts of multiple actions – such as for a multi-stage project"
  - "[T]iering of further review for applications to build at specific sites within Gateway II does not run afoul of CEQA"

California Clean Energy Committee (cont.)

– Mitigation Measure 4.11-2(b) also did *not* improperly delegate mitigation responsibility to community development department
  - CEQA allows a decision-making body (e.g., the City Council) to "shift[] responsibility" to staff to "carry out" adopted mitigation measures
  - CEQA also permits a decision-making body to delegate responsibility for implementing a mitigation monitoring and reporting program (see Public Resources Code § 21081.6)

California Clean Energy Committee (cont.)

- Court sets aside Mitigation Measures 4.11-2(c) and 4.11-2(d), which require developer to contribute funds toward
  – the development of a "Retail Strategic Plan" for suburban retail strip centers
  – preparation of an "Implementation Strategy" for the Downtown Specific Plan

California Clean Energy Committee (cont.)

- These measures "do not require the City to undertake any *action*"
  - They only require preparation of "fair share plans"
  - To be adequate, mitigation fees "must be part of a reasonable plan of actual mitigation that the relevant agency commits itself to implementing"
- Record contains no evidence that the fair share plans exist, that they would be practicable, or that the City has committed to creating them

California Clean Energy Committee (cont.)

- A "fee program at some point must be reviewed under CEQA, either as a tiered review eliminating the need to replicate the review for individual projects, or on a project-level, as applied basis"
- Here, the City's EIRs "did not adequately assess the scope of the program or fees necessary to adequately address the urban decay impacts expected to result from construction of Gateway II"

California Clean Energy Committee (cont.)

- Court sets aside Mitigation Measure 4.11-3, which requires the City to "coordinate with the current owner of the County Fair Mall to prepare a strategic land use plan for the County Fair Mall to analyze potential viable land uses for the site"
  - Only required action is "coordination"
  - Measure "does not require actual study"
  - Measure does not require any action by City to mitigate any urban decay at the County Fair Mall

California Clean Energy Committee (cont.)

- Programmatic character of EIR does not remedy these shortcomings
  - EIR purported to study the project as a whole
  - EIR purported to "implement sufficient mitigation measures to ameliorate the effects of urban decay"
  - "No further mitigation measures or EIR studies for the issue of urban decay are promised"
  - "Tiering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects of a project"

California Clean Energy Committee (cont.)

- Draft EIR rejected "*Mixed-Use Alternative*" on grounds of economic infeasibility and stated that it would not meet project objectives relating to
  - Facilitating development of a regional center to capture leakage of sale from uses not already served within the community
  - Developing revenue generating land uses to provide jobs and capture regional retail leakage

California Clean Energy Committee (cont.)

- Draft EIR *assumed* that traffic and circulation impacts of Mixed-Use Alternative would be similar to those of proposed project, as commercial trips would be reduced by residential trips would be increased
  - But Draft EIR contains *no evidence* that alternative would have "similar or greater environmental impacts" than those of the project as proposed

California Clean Energy Committee (cont.)

- City Council's CEQA Findings lacked support for rejection of Mixed-Use Alternative because it was (i) infeasible and (ii) would have greater environmental impacts than the proposed project
  - Findings did not explain how 93-acre alternative could be economically infeasible when Project as finally approved was only 61.3 acres
  - Findings said that alternative would result in
    - Greater impacts to public services and utilities
    - Fewer impacts to land use, agricultural resources, biological resources, and hydrology and water quality
    - Similar impacts in all other categories

California Clean Energy Committee (cont.)

- The rationale that the Mixed-Use Alternative was environmentally inferior to project found no support in EIR
  - City's switch from conclusion in EIR that alternative was economically infeasible to conclusion in Findings that alternative was environmentally inferior was "unexplained" and "unsupported"
  - Findings did not disclose the "analytic route" the City "traveled from evidence to action"

California Clean Energy Committee (cont.)

- Court finds that EIR did not properly analyze or mitigate the potentially significant *energy impacts* of the Project
  - "Entirety of . . . energy impacts analysis . . . comprises less than a page in the draft EIR"
    - EIR addressed only electricity and natural gas consumption, but not the amount of fuel used by vehicles traveling to and from property
    - EIR said that Building Code energy conservation requirements for non-residential buildings would be applied
  - Because the Project would comply with or exceed Title 24 requirements, the EIR concluded that the Project would have less than significant effects "regarding the wasteful, inefficient, or unnecessary consumption of energy"
    - This conclusion was based on an incomplete analysis

California Clean Energy Committee (cont.)

- EIRs shall include "[m]itigation measures proposed to minimize significant effects on the environment, including, but not limited to, measures to reduce the *wasteful, inefficient, and unnecessary consumption of energy"* (Public Resources Code, § 21100(b)(3))
- In 2009, to ensure compliance with this directive, the Natural Resources Agency amended Appendix F to the CEQA Guidelines

California Clean Energy Committee (cont.)

- As amended, Appendix F does the following:
  - Declares that "[t]he goal of conserving energy implies the wise and efficient use of energy"
  - Notes that the "means of achieving this goal" include:
    - Decreasing overall per capita energy consumption,
    - Decreasing reliance on fossil fuels such as coal, natural gas and oil
    - Increasing reliance on renewable energy sources
  - Requires that "[p]otentially significant energy implications of a project shall be considered in an EIR to the extent relevant and applicable to the project"

California Clean Energy Committee (cont.)

- As amended, Appendix F does the following (cont.):
  - States that, among the factors to be considered, if applicable to the project, are "[p]otential measures to reduce wasteful, inefficient and unnecessary consumption of energy during construction, operation, maintenance and/or removal," *including "[a]lternate fuels (particularly renewable ones)* or energy systems"
  - Treats energy impacts as including "the project's projected *transportation energy use* requirements and its overall use of efficient transportation alternatives"

California Clean Energy Committee (cont.)

- EIR did not address the transportation energy impacts of the Project
  - Although reduction in the size of the project and measures reducing vehicle trips may have reduced transportation energy consumption, "the City cannot say how much less transportation energy is needed for the project as approved because the issue has never been assessed in an EIR"
    - "CEQA EIR requirements are not satisfied by saying an environmental impact is something less than some previously unknown amount"
    - EIR is deficient for failing to "assess or consider mitigation for transportation energy impacts"

California Clean Energy Committee (cont.)

- EIR did not adequately address the *construction and operational energy impacts* of the Project
  - The Building Code addresses energy savings for components of new commercial construction, but "does not address many of the considerations required under Appendix F," such as
    - Whether a building should be constructed at all
    - How large it should be
    - Where it should be located
    - Whether it should incorporate renewable energy resources, or anything else external to the building's envelope
  - A requirement of Building Code compliance does not, by itself, constitute an adequate assessment of mitigation measures for addressing energy impacts during construction and operation

California Clean Energy Committee (cont.)

- Requirement that nonresidential buildings comply with *CALGreen* is *not* enough to satisfy Appendix F
  - CALGreen requires
    - 20 percent reduction in indoor water usage
    - Separate water meters for nonresidential buildings
    - Diversion of construction waste from landfills
    - Energy systems inspections for buildings larger than 10,000 sf
    - Low Pollutant interior finish material
  - But CALGreen does *not address*
    - Construction and operational impacts for a project intended to transform agricultural land into a regional commercial center
    - Transportation energy impacts for such a project

California Clean Energy Committee (cont.)

- City's EIR addressed energy impacts only of retail space, and "did not study the construction or operational energy impacts of three hotels, a 20,000 square foot restaurant, three fast food restaurants, an auto mall, and 100,000 square feet of office space"
- EIR did not "indicate any investigation into *renewable energy options* that might be available or appropriate for the project"

Sierra Club v. County of Fresno

- *Court sets aside County's approvals of, and EIR for, 942-acre Friant Ranch Specific Plan, a proposed 2,500-unit "active adult" master-planned community north of City of Fresno and near, but not adjacent to, the San Joaquin River*

Sierra Club v. County of Fresno (cont.)

- The Court found three sets of flaws in the EIR:
  - The EIR failed to include an analysis that *correlated* the project's emissions of air pollutants to its impacts on human health
  - The mitigation measures for the project's long-term air quality impacts are vague and unenforceable and lack specific performance criteria
  - The EIR statement that the air quality mitigation provisions will *substantially* reduce air quality impacts is unexplained and unsupported

Sierra Club v. County of Fresno (cont.)

- Court addressed the *standard of judicial review* for a plaintiff's claim that, although an EIR addresses a legally mandated topic, the information provided is *insufficient* under CEQA
  - Conceptually, this type of claim involves reviewing courts *drawing a line* that divides *sufficient* discussions from *insufficient* ones
  - Drawing this line presents *a question of law* subject to *independent review* by the courts
    - The terms themselves—sufficient and insufficient—provide little, if any, guidance as to where the line should be drawn
    - They are simply labels applied once the court has completed its analysis

Sierra Club v. County of Fresno (cont.)

- But compare *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1546:

  "CEQA challenges *concerning the amount or type of information* contained in the EIR, the scope of analysis, or the choice of methodology are factual determinations are factual determinations reviewed for substantial evidence."

  "Put another way, '[w]e apply the substantial evidence test to conclusions, findings, and determinations and to challenges to the scope of an EIR's analysis of a topic, the methodology used for studying an impact, and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions.'"

Sierra Club v. County of Fresno (cont.)

- The EIR *adequately* discussed the Project's wastewater impacts; it did not lack adequate information regarding
  - The amount and location of wastewater application
  - The hydrogeology of the Beck Property, the site selected for the proposed treatment plant and storage pond

Sierra Club v. County of Fresno (cont.)

- The initial proposal was to place new wastewater treatment facilities adjacent to a small existing plant in Friant and to discharge treated effluent directly into the San Joaquin River during winter, when irrigation demand was low
- County Board of Supervisors disallowed direct River discharge and instead approved an environmentally superior alternative wastewater treatment option at the 145-acre Beck Property
  - The site had been used by a gravel extraction operation and contains highly disturbed agricultural land and an aggregate mining quarry
  - A new treatment plant built at the site would provide tertiary treatment
  - The quarry would be used for year-round storage of treated effluent

Sierra Club v. County of Fresno (cont.)

- The EIR adequately disclosed "how a year's production of effluent will be handled over the course of a year and the amount of land on which it will be applied for irrigation"
  - Sufficient information regarding (i) "amounts of effluent produced and recycled" and (ii) the location of effluent application could be discerned from
    - Draft EIR text
    - Draft EIR Appendices
  - More specific information was provided in
    - Final EIR text and responses to comments
    - Technical memorandum supporting the Final EIR
    - Infrastructure Master Plan associated with Specific Plan

Sierra Club v. County of Fresno (cont.)

- The Draft and Final EIRs together adequately disclosed the hydrogeology of the Beck Property
  - Draft EIR cited *impermeable soil conditions* in finding it "unlikely" that there was a hydrological connection between the quarry and the River
  - Additional information produced during the environmental review process after release of the Draft EIR
    - confirmed this conclusion
    - identified the *direction of groundwater flow* as another factor making a hydrological connection unlikely

Sierra Club v. County of Fresno (cont.)

- EIR failed to sufficiently "*correlate*" the Project's air emissions to impacts on human health
  - Proper analysis must both (i) "*identify*" potential health effects resulting from air quality effects and (ii) "*analyze*" such potential health effects
  - The County's EIR
    - sufficiently identified health effects
    - insufficiently analyzed health effects

Sierra Club v. County of Fresno (cont.)

- EIR identified, *in a general manner*, the adverse health impacts that could result from the Project's effects on air quality; specifically, the EIR
  - listed many types of air pollutants that the project will produce
  - identified the tons per year of PM_{10}, ROG, NOx, and other pollutants that the project is expected to generate
  - provided a general description of each pollutant that acknowledges how it affects human health

Sierra Club v. County of Fresno (cont.)

- But the EIR "was *short on analysis*"
  - It did not correlate the additional tons per year of emissions to adverse human health impacts that could be expected to result from those emissions
  - Readers can infer that the project will make air quality and human health worse, but "more information is needed to understand that adverse impact"
    - The *better/worse dichotomy* is just "a *useful starting point*" for analyzing adverse environmental impacts, including those to human health

Sierra Club v. County of Fresno (cont.)

- Using "extreme examples" to "illustrate this point," the court says that a reader cannot tell whether Project emissions
  - "will require people with *respiratory difficulties* to wear filtering devices when they go outdoors in the project area or nonattainment basis"; or
  - "will be no more than a drop in the bucket to those people breathing the air containing the additional pollutants"

Sierra Club v. County of Fresno (cont.)

- Quantitative information in the EIR further demonstrated the lack of information about the potential magnitude of the impact on human health
  - Table 3.3-2 in Draft EIR sets forth the *days each year* that pollutants exceeded *federal and state standards* at three monitoring stations in the Fresno area
  - Final EIR does not show "what impact, if any, the project is likely to have on the *days of nonattainment per year*—it might double those days or it might not even add a single a day per year"
    - Such information would give the public and decision makers "some idea of the *magnitude* of the air pollutant impact on human health"

Sierra Club v. County of Fresno (cont.)

- Similarly, the EIR made no connection or correlation between
  - the EIR's statement that exposure to ambient levels of ozone ranging from 0.10 to 0.40 parts per million for one to two hours has been found to significantly alter *lung functions*; and
  - the emissions that the Project is expected to produce

Sierra Club v. County of Fresno (cont.)

- "[I]nformation about the magnitude of the human health impacts is relevant to the board of supervisors' *value judgment* about whether other considerations override the adverse health impacts"
  - "[A] disclosure of respiratory health impacts that is limited to the better/worse dichotomy does not allow the decision makers to perform the required balancing of economic, legal, social, technological and other benefits of the project against the adverse impacts to human health"
    - Decision makers "have not been informed of the *weight to place on the adverse impact side of the scales*"

Sierra Club v. County of Fresno (cont.)

- Court is not saying that the County "*must* connect the project's levels of emissions to the standards involving days of nonattainment or parts per million"
  - County has discretion in choosing what type of analysis to provide
  - But "there must be *some analysis* of the correlation between the project's emissions and human health impacts"
    - *"[B]are numbers*" are insufficient to translate "into health impacts resulting from this project"

Sierra Club v. County of Fresno (cont.)

- Court finds several problems with Mitigation for Operational Air Quality Impacts (MM 3.3.2)
  - Measure is unacceptably *vague* with respect to enforceability
  - EIR lacks quantitative analysis supporting claim that Measure would "substantially reduce" air quality impacts
  - MM 3.3.2 allows County to replace identified components with equally or more effective mitigation, but does not include performance standards that such substitute mitigation would have to satisfy
  - MM 3.3.2 is insufficiently *specific*, as it lacked performance criteria for
    - Tree plantings to protect buildings from energy consuming environmental conditions
    - Catalyst systems for HVAC units
    - Bike lockers and racks
    - Bicycle storage spaces for apartments and condominiums

Sierra Club v. County of Fresno (cont.)

BACKGROUND

- Primary source of long-term emissions would be vehicular traffic coming to and departing from the project site
- EIR identified, but did not attempt to quantify the air quality benefits of, Specific Plan goals and policies promoting alternative forms of transportation and minimizing the number and length of vehicle trips
- Even with MM 3.3.2, operational air quality effects would be significant and unavoidable

Sierra Club v. County of Fresno (cont.)

- Mitigation Measure #3.3.2 is not a single measure, but a dozen separate provisions that address
  - nonresidential development
  - reducing residential energy consumption
  - promoting bicycle usage
  - transportation emissions
- Measure said that "guidelines" dealing with nonresidential uses shall be required "where feasible and appropriate"
- EIR said the overall measure would "substantially mitigate" operational air quality impacts

Sierra Club v. County of Fresno (cont.)

- EIR was *not* required to quantify benefits of Specific Plan goals and policies because they were not part of MM 3.3.2; County thus was not required to
  - Explain how goals and policies would minimize emissions
  - Quantify, or otherwise describe, the extent to which the policies would minimize emissions
- Anyway, EIR accounted for benefits in overall project emissions estimates produced by URBEMIS software
- But compare *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645 (EIR deficient for not analyzing effectiveness of project features tending to mitigate impacts)

Sierra Club v. County of Fresno (cont.)

- Court announces a new "*vagueness doctrine*" applicable to mitigation measures, similar but not identical to "the due process vagueness doctrine"
  - A vague provision can make persons of common intelligence guess at its meaning and cause them to differ as to its application, which may result in arbitrary decisions by judges or others enforcing the requirement or prohibition
  - One aspect of the vagueness doctrine examines whether the requirement or prohibition in question "provides *reasonably adequate standards to guide enforcement*"

Sierra Club v. County of Fresno (cont.)

- MM 3.3.2 was *vague* in failing to identify means by which County will make its component requirements enforceable
  - Measure is not clear as to whether or not the requirement for equipping HVAC units with catalyst systems would be made a permit condition
  - Measure does not specify *who* will select trees for protecting buildings or decide on planting locations
    - Reader is left to speculate as to whether choice will be made by developer or County

Sierra Club v. County of Fresno (cont.)

  - Other components of MM 3.3.2 suffer the same problem
    - None of the 12 provisions identify the person or entity that will perform the mitigation
    - Some measures even lack a verb (e.g., equip or install) that indicates the action to be taken
  - Language requiring adoption of components of MM 3.3.2 applicable to nonresidential development where "feasible and appropriate" adds to vagueness problem
    - The term "appropriate" is not defined in CEQA or the Guidelines
    - The term could be interpreted as granting County a wide range of discretionary authority with regard to the imposition of future mitigation

Sierra Club v. County of Fresno (cont.)

- For these reasons, MM # 3.3.2 violates statutory requirement that mitigation measures be "fully enforceable through permit conditions, agreements or other measures" (Pub. Resources Code, § 21081.6, subd. (b))
- *Commentary*: court seems unaware that the Mitigation Monitoring or Reporting Program is the identified statutory mechanism for setting forth how a public agency ensures that a project proponent complies with adopted project changes or conditions of project approval during project implementation (see *id.*, § 21081.6, subd. (a)(1))

Sierra Club v. County of Fresno (cont.)

- EIR did not adequately support the conclusion that MM 3.3.2 would "substantially mitigate" the significant and unavoidable operational air quality effects of the Project
  - The term "substantially mitigate" implies that someone has quantified the expected reductions
  - EIR includes no such quantification

Sierra Club v. County of Fresno (cont.)

- If County wants to make the same claim on remand, it "should include enough facts and analysis in the EIR" to provide substantial evidence to support the conclusion
- If the County performs no quantitative assessment on remand, then
  - the claim of a substantial reduction should not be made, or
  - the nonquantitative basis for the claim should be disclosed

Sierra Club v. County of Fresno (cont.)

- MM 3.3.2 impermissibly defers the formulation of specific mitigation requirements
  - Ending paragraph states that the "County and [Air District] may substitute different air pollution control measures for individual projects, that are equally effective or superior to those proposed herein"
    - The contents of the substitute provisions are unknown at present and thus must be formulated in the future
    - MM 3.3.2 should have included performance standards governing the potential substitute measures
      - Such standards are necessary to evaluate whether the substituted measures, in fact, are equally or more effective

Sierra Club v. County of Fresno (cont.)

- Components of MM 3.3.2 lacking adequate performance standards include
  - Measure requiring tree planting to protect buildings from energy consuming environmental conditions – as to "the trees selected and located"
  - Measure requiring that HVAC units be equipped "with a PremAir or similar catalyst system, if reasonably available and economically feasible at the time building permits are issued"
    - The measure is vague as to whether it would be made a permit condition, as discussed earlier
    - The measure does not identify the relevant performance characteristics of a PremAir system and thus fails to set forth specific performance criteria
    - The measure lacks objective criteria for determining when another catalyst system is "similar" to the PremAir

Sierra Club v. County of Fresno (cont.)

- Additional components of MM 3.3.2 lacking adequate performance standards include
  - Measure requiring nonresidential projects to have bike lockers or racks
    - This measure has no performance standards
  - Measure requiring apartments and condominiums to provide "at least two Class I bicycle storage spaces per unit"
    - This measure is specific only about the amount of storage required
    - There is no basis for evaluating the emissions reductions achieved by the measure

Sierra Club v. County of Fresno (cont.)

- Final EIR adequately responded to a comment that the County should consider requiring the developer to enter into a Voluntary Emissions Reduction Agreement (VERA) with the San Joaquin Valley Air Pollution Control District (SJVAPCD)
  - County's response to comment explained that
    - "[A] VERA is a voluntary agreement and therefore is not a mitigation measure that is enforceable by the County"
    - "VERAs are typically handled prior to issuance of a tentative map. However, the application will also be subject to an [ISR], at which time the application will discuss a VERA with the [Air District.]"
    - The Air District had jurisdiction over various project-related approvals, including the action to ensure compliance with Rule 9510

Sierra Club v. County of Fresno (cont.)

- VERAs are a tool authorized by the Indirect Source Rule process of the SJVAPCD
- District Rule 9510 requires a certain amount of emission reductions from each new development project; those reductions may be achieved through
  - on-site emission reductions
  - payment of a fee to fund off-site emission reducing projects or
  - a combination of the two

Sierra Club v. County of Fresno (cont.)

- The County's Final EIR responses were adequate, as the County clearly indicated that the consideration of a VERA would occur at a later stage and explained that process
  - Plaintiffs have identified no statute, regulations or case law that requires the consideration of VERA at this point in the administrative process

Citizens For a Sustainable Treasure Island v. City and County of San Francisco

Court of Appeal upheld the EIR for a project designed to transform a former naval station on San Francisco's Treasure Island into a vibrant mixed-use community

Citizens For a Sustainable Treasure Island (cont.)

- The project is comprehensive plan to redevelop Naval Station Treasure Island, which ceased operations in 1997
- The project will be constructed over 15 to 20 years, with flexible parameters for certain project elements. It includes:
  - up to 8,000 new homes (with at least 25 percent designated as affordable units available at below-market prices);
  - 500 hotel rooms;
  - commercial, retail, and office space;
  - 300 acres of parks, playgrounds, and open space;
  - restoration and re-use of historic buildings, public utilities, bike and transit facilities, updated infrastructure, and a new Ferry Terminal and intermodal Transit Hub.

Citizens For a Sustainable Treasure Island (cont.)

- City and County of San Francisco, along with the Treasure Island Development Authority, certified the EIR for the Treasure Island / Yerba Buena Island Project in June 2011
- Citizens for a Sustainable Treasure Island challenged the decision, claiming the environmental documents violated CEQA
- Trial court denied the petition in its entirety. On appeal, the First District Court of Appeal affirmed the trial court's judgment

Citizens For a Sustainable Treasure Island (cont.)

- Petitioner's main argument on appeal was that the lead agencies abused their discretion by preparing a "project" EIR instead of a "program" EIR. Essentially, the petitioner argued that the project was too "flexible" and uncertain to support project-level review
- The court disagreed, noting that the question under CEQA case law is not whether a particular type of EIR is prepared, but rather whether the EIR meets CEQA's mandate to adequately identify
  - Key question from the Court's perspective is whether the EIR addressed the environmental impacts of the Project to a "degree of specificity" consistent with the underlying activity being approved through the EIR
  - The Court stated that the "level of specificity of an EIR is determined by the nature of the project and the 'rule of reason', rather than any semantic label accorded to the EIR." 8 [citing California Oak Foundation v. Regents of University of California (2010) 188 Cal.App.4th 227]
  - The EIR contained all available information about the Project, while providing for flexibility needed to respond to changing conditions and unforeseen events. Because of the build-out projection of 15 – 20 years, CEQA would require supplemental review for any aspects of the Project where the environmental impacts were not fully examined in the original EIR

Citizens For a Sustainable Treasure Island (cont.)

- Petitioners argued that the City prepared the EIR as a project EIR to circumvent the fair argument standard that would otherwise be applied to a program EIR when evaluating the need for subsequent environmental review
- The court noted that petitioner's "fair argument" issue was "based on a flawed legal premise" and that "[f]or purposes of the standard of review, the same substantial evidence standard applies to subsequent environmental review for a project reviewed in a program EIR or a project EIR."

Citizens For a Sustainable Treasure Island (cont.)

- Petitioners claimed the project description was not sufficiently accurate and stable to meet CEQA's requirements, arguing that it was too abstract and only included conceptual descriptions of building and street layouts subject to change; and
- The court upheld the EIR's project description, emphasizing that the EIR and planning documents did contain concrete information about the main features of the Project, which remained consistent throughout the EIR process, and the EIR "cannot be faulted for not providing detail that, due to the nature of the Project, simply does not now exist."
  - Merely because "all hypothetical details" were not resolved and the EIR did "not anticipate every permutation or analyze every possibility" did not render its project description misleading, inaccurate or vague; rather, the EIR's 84-page "Project Description" chapter accurately described the Project and "remained accurate, stable, and finite throughout the EIR process."

Citizens For a Sustainable Treasure Island (cont.)

- Petitioners challenged the EIR's discussion of hazardous substances because it did not specify precisely where and to what extent remediation would be required after development began
- Citing the California Supreme Court in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, the court stressed that a CEQA analysis may be postponed when project details are not "reasonably foreseeable" at the time that the lead agency approves the project
  - In this case, the Navy was in the process of cleaning up the contaminated portions of the project site, and intended to complete the cleanup prior to transferring the land for development. Thus, the developer could not be expected to know the precise role that it would play in the investigation and clean up of specific portions of the Project.
  - The EIR identified all of the regulatory standards that would apply should additional remediation be necessary, and as a result, the discussion of hazardous substances on the project site was sufficient

Citizens For a Sustainable Treasure Island (cont.)

- Petitioners challenged the EIR's discussion of historic resource preservation and consistency with tideland trusts
- In rejecting petitioner's arguments, the court emphasized that the EIR was adequate even though the future uses for certain buildings and tidal areas were not yet fully defined (allowing that the EIR could not fully articulate how specific project components would ensure preservation of historical resources and compliance with tidal trust laws).
  - The EIR presented the regulations and processes that the Project would comply with, and that was sufficient for the decision makers to analyze the environmental impacts of the Project

Citizens For a Sustainable Treasure Island (cont.)

- Petitioner also argued that significant new information regarding the Project's potential interference with the U.S. Coast Guard's regulation of ship traffic in the San Francisco Bay had been developed after the draft EIR was circulated for public review, thereby requiring recirculation of the EIR for additional public comment
- The court stated that new information is only significant and requires recirculation of the EIR if adding the new information deprives the public of meaningful opportunity to comment on substantial adverse environmental impacts.
  - In this case, multiple potential solutions avoided any impact and therefore, there were no adverse effects and no reason to recirculate
  - The court also highlighted Petitioner's failure to set forth the evidence supporting the City's findings, and then to show why the evidence is lacking.

Supplemental Review

Supplements to EIRs, Subsequent EIRs, and Addendums

- Agency retains discretion
- Triggered where there is a new significant impact or a substantial increase in the severity of the impact based on:
  - Substantial change in the project
  - Substantial change in the project circumstances
  - New information (also if new information shows mitigation or alternatives is now feasible or new that proponent declines to adopt)
- Also applies to Negative Declarations and MNDs
- Agency prepares an addendum (no public circulation) where trigger for supplement or subsequent does not occur

Pub. Res. Code § 21166; 14 Cal Code of Regulations § 15162 - 15164

SUBSEQUENT ENVIRONMENTAL REVIEW

- *Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal. App.4th 192
- *Citizens Against Airport Pollution v. City of San Jose* (2014) --- Cal.Rptr.3d ---- 2014 WL 2987959

Latinos Unidos de Napa v. City of Napa

Court of Appeal upholds City of Napa's approval of a 2009 Housing Element Update based on the 1998 program EIR for the "Envision Napa 2020" General Plan; the Update was "within the scope" of General Plan EIR

Latinos Unidos de Napa (cont.)

- City's 1998 Program General Plan EIR anticipated development through 2020, based on updated Land Use Element and other updated elements and the existing Housing Element
  - In 1998, City anticipated updating its Housing Element in 2001
  - City ultimately updated its Housing Element in both 2001 and 2005

Latinos Unidos de Napa (cont.)

- City approved 2009 Housing Element Update after preparing Initial Study concluding that Update was "within the scope" of 1998 EIR
  - Initial Study concluded that, although the Update could lead to increased maximum densities in some areas, the Update would not create any new or more severe environmental impacts than anticipated in 1998
    - Some parts of the City have developed at lower densities than assumed in 1998 EIR
    - The City's rate of growth has been slower than anticipated
    - The increased densities made possible by the Update would be within scope of impacts anticipated in EIR

Latinos Unidos de Napa (cont.)

- Housing Element Update was subject to standards in CEQA and the Guidelines governing when supplemental environmental review is necessary
  - Substantial evidence supported the City's characterization of its action (a Housing Element Update) as a change to a previously approved project (the 2020 General Plan, approved in 1998)
  - The City's decision was thus subject to judicial review under the deferential substantial evidence standard
  - The City's decision was not subject to the non-deferential "fair argument" standard governing the initial decision whether to prepare an EIR in the first instance

Latinos Unidos de Napa (cont.)

- Court applies the substantial evidence test to the question of whether the City's action was a "new project" or a change to an approved project
  - Court rejects reasoning of Third District Court of Appeal in *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288
    - That case applied a non-deferential de novo "question of law" standard to that key question
  - Court embraces reasoning of Second District Court of Appeal in *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385
    - That case criticized *Save Our Neighborhood v. Lishman* and argued for a deferential approach instead

Latinos Unidos de Napa (cont.)

- CEQA Guidelines section 15168(c) allows an agency to find that a "later activity" is "within the scope of the project covered by the program EIR"
  - Such a finding is proper where "the agency finds pursuant to [CEQA Guidelines] Section 15162" that "no new effects could occur or no new mitigation measures would be required"
  - Where the later activity would "involve site specific operations," this evaluation should occur through a "written checklist or similar device" that can "document the evaluation of the site"

Latinos Unidos de Napa (cont.)

- Under section 15168, the "fair argument" standard only applies where an agency concludes that a later activity is *not* "within the scope" of the program EIR and a site-specific negative declaration or EIR is therefore needed
  - A "within the scope" determination is subject to the standards governing supplemental review, which are subject to a deferential standard of judicial review
  - A decision that the agency needs to undertake site-specific analysis, leading to a negative declaration or EIR, is subject to the fair argument" standard (see *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307)

Citizens Against Airport Pollution v. City of San Jose

Court of Appeal affirmed the trial court's judgment upholding the City of San Jose's eighth addendum to its Airport Master Plan against plaintiff Citizens Against Airport Pollution's (CAAP) CEQA challenge that changes to the Plan would cause any new significant environmental impacts

Citizens Against Airport Pollution (cont.)

- The City prepared an Airport Master Plan for the San Jose International Airport in 1980
- A final EIR (FEIR) for the first Airport Master Plan update was approved in 1997, followed by a supplemental EIR (SEIR) in 2003
- An eighth update to the Airport Master Plan was approved pursuant to an EIR addendum
- The eighth addendum analyzed amendments that:
  (1) changed the size and location of future air cargo facilities;
  (2) replaced planned air cargo facilities with 44 acres of general aviation facilities; and
  (3) modified certain taxiways to accommodate a forecasted increase in large corporate jet use as a percentage of general aviation.

Citizens Against Airport Pollution (cont.)

- Petitioners argued that a supplemental or subsequent EIR was required, and that "the eighth addendum failed to adequately assess or analyze the impacts of the taxiway modifications and the construction of general aviation facilities on noise, air pollution, and the burrowing owl habitat" and also "failed to comply with newly adopted rules mandating review of project impacts on greenhouse gases and climate change."
- Although acknowledging that "exhaustion of administrative remedies is a jurisdictional prerequisite to a CEQA action," the Court found no need to reach the City's argument and treated the order denying petitioner's petition as an appealable final judgment and affirmed that judgment, denying petitioner's writ petition on the merits in all respects

Citizens Against Airport Pollution (cont.)

- The Court reiterated the well established rules regarding supplements and addendums:
  - An addendum is proper where some changes or additions to a previously-certified EIR are necessary, but none of the conditions described in Public Resources Code § 21166 or Guidelines § 15162 calling for preparation of a subsequent EIR have occurred
  - The agency's decision not to require an supplement must be upheld if substantial record evidence supports the determination that changes in the project or its circumstances were not so substantial as to require major revisions in the EIR. This deferential standard reflects that in-depth CEQA review has already occurred, the time for challenging that review has long expired, and the question at hand is "whether circumstances have changed enough to justify repeating a substantial portion of the process." [Citing *Committee for Green Foothills v. Santa Clara County* Bd. of Supervisors (2010) 48 Cal.4th 32, 54-55.]

Citizens Against Airport Pollution (cont.)

- Supplements and addendums (continued):
  - A brief explanation of the agency's decision not to prepare a subsequent EIR should be included either in the addendum itself, the lead agency's required project findings, or elsewhere in the record, and must be supported by substantial evidence. [Citing *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1398.]
  - An addendum need not be circulated for public review; rather, it can be included in or attached to a Final EIR or adopted negative declaration (ND) and must be considered by the decisionmaking body along with the prior EIR or ND before deciding on the project.
  - The burden is on the challenger to show that no substantial evidence supports the agency's findings; after the project has been subjected to an environmental review, "the statutory presumption flips in favor of the developer and against further review." [Citing *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 532.]

Citizens Against Airport Pollution (cont.)

- The Court held that Public Resources Code § 21166's standards setting forth the "limited circumstances" for further environmental review apply also to program EIRs [citing *May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, 1316-1317, 1325-1326]
  - substantial evidence in the administrative record showed "the amendments to the Airport Master Plan that are addressed in the eighth addendum will not result in any new significant impacts on noise, air quality, and the burrowing owl habitat that are substantially different from those described in the 1997 EIR and the 2003 SEIR."
  - The Court stated: "Therefore, even assuming, without deciding, that the 1997 EIR for the Airport Master Plan constitutes a program EIR, as CAAP argues, we are not persuaded that the proposed changes to the Airport Master Plan that are addressed in the eighth addendum constitute a new project that requires a new EIR."

Citizens Against Airport Pollution (cont.)

- Petitioners challenged the adequacy of the noise analysis to support the use of the addendum
- The Court rejected the challenge
  - "the standard of review that applies to a CEQA attack on an agency's use of an addendum to an EIR is deferential" and that courts "resolve reasonable doubts in favor of the administrative decision" in applying the substantial evidence standard of review
  - "We find that there is substantial evidence [in the City's expert noise analysis] to support the eighth addendum's conclusion that the proposed changes to the Airport Master Plan would not result in any new significant noise impacts and/or noise impacts that are substantially different from those described in the 1997 EIR and the 2003 SEIR."

Citizens Against Airport Pollution (cont.)

- Petitioners challenged the addendum's lack of a GHG analysis
- The Court held that a GHG analysis was not required when the 1997 EIR or 2003 SEIR were prepared, and that an SEIR is likewise not required for the purpose of such analysis at the present time despite the adoption in 2010 of CEQA Guidelines amendments requiring such analysis.
  - "The potential environmental impact of greenhouse gas emissions has been known since the 1970's" and therefore "information about the potential environmental impact of [GHG] emissions was known or could have been known at the time the 1997 EIR and the 2003 SEIR … were certified."
  - "Since the potential impact of greenhouse gas emissions does not constitute new information within the meaning of section 21166, subdivision (c), City did not violate section 15064.4 of the Guidelines by failing to analyze [GHG] emissions in the eighth addendum."

Litigation Issues

CEQA LITIGATION

- *Citizens for Ceres v. Superior Court of Stanislaus County* (2013) 217 Cal.App.4th 889
- *May v. City of Milpitas* (2013) 217 Cal.App.4th 1307
- *Comunidad en Accion v. Los Angeles City Council* (2013) 219 Cal.App.4th 1116
- *Protect Agricultural Land v. Stanislaus County Local Agency Formation Commission* (2014) 223 Cal.App.4th 550
- *Citizens for a Green San Mateo v. San Mateo Community College District* (2014) 173 Cal.Rptr.3d 47 2014 WL 2735052

Citizens for Ceres v. Superior Court of Stanislaus County

- *In case involving challenge to EIR for Wal-Mart anchored shopping center, Court of Appeal grants writ overturning trial court order excluding documents from administrative record; appellate court holds that "common-interest doctrine" does not protect communications between lead agency and applicant occurring prior to project approval*

Citizens for Ceres (cont.)

- Citing the controversial nature of the project and the "relatively high risk of litigation," City set up process by which all communications between City and applicant went through City's outside counsel and counsel for the applicant
- City cited "common interest doctrine" to support withholding of documents from record, along with the fact that many documents were "administrative draft documents or documents not otherwise released to the public"

Citizens for Ceres (cont.)

- Court rejects grounds for withholding documents
  - Public Resources Code section 21167.6(e)(7) requires CEQA records to include "all written evidence or correspondence submitted to or transferred from the respondent agency with respect to compliance with [CEQA] or with respect to the project"
  - CEQA does not abrogate the attorney-client privilege or other evidentiary privileges in the Evidence Code, but the "common interest doctrine" does not extend the attorney-client privilege to pre-approval communications between agencies and applicants

Citizens for Ceres (cont.)

- Prior to project approval, there is no common interest between agencies and applicants
  - The lead agency is supposed to be neutral and objective, and its interest in is complying with CEQA
    - CEQA documents must be unbiased
    - Agencies cannot commit to approve project before completion of any required environmental analysis
  - In contrast, the applicant's primary interest is in obtaining project approval and a *favorable* CEQA document
  - Although both agencies and applicants want documents to survive judicial review, the parties may have different interests with respect to impact conclusions that could go either way (significant or less than significant)

Citizens for Ceres (cont.)

- To the extent that the Third District Court of Appeal's decision in *California Oak Foundation v. County of Tehama* (2009) supports the conclusion that the common-interest doctrine may apply to agency-applicant communications during the administrative process prior to project approval, the Fifth District Court of Appeal disagrees
  - The facts in *California Oak Foundation* are unclear on this point – the *Citizens for Ceres* case may create a conflict between the two appellate districts
  - No party in case sought Petition for Review from Supreme Court; and the Court denied a request for depublication

May v. City of Milpitas

- *In case involving a CEQA challenge to 732-unit condominium project consistent with an approved specific plan, Court of Appeal upholds trial court order sustaining demurrer based on 30-day statute of limitations under Government Code section 65457 rather than 35-day statute of limitations normally commenced by the filing of a Notice of Exemption (NOE) under CEQA*

May v. Milpitas (cont.)

- Government Code section 65457 exempts from CEQA residential projects consistent with specific plans for which EIRs were prepared, except where there are grounds for a supplemental EIR for the specific plan under Public Resources Code section 21166
- Even so, in concluding that the condo project consistent with specific plan required no further CEQA review, the City cited two provisions of the CEQA Guidelines and not section 65457:
  - Pursuant to CEQA Guidelines section 15168 (program EIRs), the project's impacts were within the scope of the program EIR for the specific plan
  - It could be seen with certainty that the project had no possibility of having a significant effect on the environment within the meaning of CEQA Guidelines section 15061(b)(3)

May v. Milpitas (cont.)

- Government Code section 65457 contains its own 30-day statute of limitations for any challenge to an agency approval of a project pursuant to a specific plan without the agency first preparing a supplemental EIR for the specific plan
- This is the proper statute of limitations for any "residential project within the purview of . . . section 65457's exemption"
- To the extent there is a conflict between this provision and the authority in CEQA to file a NOE starting a 35-day limitations period, section 65457 governs as being more narrow and addressed to specific circumstances

May v. Milpitas (cont.)

- Even though the City invoked Guidelines sections 15063(b)(3) and 15168 in finding no need for further CEQA review for the project, the Court found that the City's resolutions "in essence factually invoked" the exemption under section 65457
  - "Resolution expressly stated that the project was exempt and it was 'consistent with the certified EIR'" for the specific plan
  - The resolution cited section 15168, which includes its own reference to section 15162, which is the Guidelines section parallel to Public Resources Code section 21166, which is specifically mentioned in Government Code section 65457
    - The conclusion that the project's impacts were "within the scope" of the analysis of the program EIR was akin to a finding that there was no need for a supplemental EIR pursuant to section 65457

Comunidad en Accion v. Los Angeles City Council

- *Court of Appeal overturns trial court action dismissing CEQA case challenging EIR for transfer station due to petitioner's failure to "request a hearing" within 90 days of filing suit*
  - Court of Appeal holds that, where attorney fails to properly calendar deadline for requesting hearing, relief is available under Code of Civil Procedure section 473

Comunidad en Accion (cont.)

- CEQA requires that a petitioner "shall request a hearing within 90 days from the date of filing the petition or shall be subject to dismissal on the court's own motion or on the motion of any party" (Pub. Resources Code, § 21167.4(a))
  - Editorial: this is the worst error CEQA petitioners can make, as it usually leads to dismissal

Comunidad en Accion (cont.)

- Code of Civil Procedure section 473 allows courts to relieve a party or attorney from an adverse judgment, dismissal, order, or other proceeding resulting from "mistake, inadvertence, or excusable neglect"
  - Despite unforgiving nature of most earlier cases involving the "90-day rule" under CEQA, case law under 473 has long let lawyers off the hook where they miss litigation deadlines due to calendaring errors

Comunidad en Accion (cont.)

- Here, petitioners were generally diligent in prosecuting case, and requested CEQA hearing the day after receiving a motion to dismiss based on missed deadline
  - Request for hearing was due on September 8, 2010
  - Motion to dismiss was filed on September 14, 2010
  - Petitioner filed request for hearing on September 15, 2010
- Petitioners' attorney claimed that he inadvertently omitted the deadline from his personal calendaring system, and that this mistake was compounded by family illness that required him to leave the state between August 26, 2010, and September 8, 2010

Protect Agricultural Land v. Stanislaus County Local Agency Formation Commission

- *Court dismisses CEQA lawsuit challenging decision by Local Agency Formation Commission (LAFCO) approving 960-acre annexation and sphere of influence amendment relating to West Landing Specific Plan Reorganization*

Protect Agricultural Land (cont.)

- In CEQA lawsuit against LAFCO, Petitioners erroneously filed petition for writ of mandate instead of "reverse validation action"
  - Cortese-Knox-Hertzberg (CKH) Reorganization Act (Gov. Code, § 56103) requires that any challenge to a *completed* annexation be via either (i) a validating action or (ii) a quo warranto proceeding filed by the Attorney General

Protect Agricultural Land (cont.)

- Code of Civil Procedure section 860 provides roadmap for filing reverse validation action
  - Requirements include newspaper publication of summons for a prescribed period
  - Action can be dismissed if plaintiff cannot prove satisfaction of publication requirements within 60 days of filing suit
- Plaintiffs here failed to satisfy publication requirements and sought relief for "good cause" under Code of Civil Procedure section 473

Protect Agricultural Land (cont.)

- Relief is generally available under section 473 where attorney has made an "honest and reasonable mistake of law on a complex and debatable issue"
- Here, Court of Appeal finds that the trial court reasonably concluded that Plaintiffs' counsel lacked good cause for failing to understand legal requirements, which were clearly laid out in case law and available secondary legal materials

Protect Agricultural Land (cont.)

- Court also finds that a CEQA claim attacking a completed annexation is an "action to determine the validity of any change of organization, reorganization, or sphere of influence" for purposes of Government Code section 56103
  - Reverse validation proceeding was thus the only permissible means for attacking LAFCO action

Citizens for a Green San Mateo v. San Mateo Community College District

- *Court rejects as untimely a July 2011 lawsuit attacking a January 2007 Mitigated Negative Declaration for a Community College District's Facility Improvement Project*
  - MND put neighbors on sufficient notice of potential tree-cutting in "North Gateway" campus area of concern to them
  - Even if MND did not constitute adequate notice, the District provided specific notice of the actual tree-cutting in September and November 2010, more than 180 days before suit was filed
  - Even if November 2010 notice, hearing, and decision did not provide adequate notice, actual tree-cutting in late December 2010 provided adequate notice more than 180 days before suit was filed

Citizens for a Green San Mateo

BACKGROUND

- The District owns and operates three public community colleges in San Mateo County, including the College of San Mateo (CSM), situated on 153 acres on a hilltop in the City of San Mateo
- In August 2006, the District adopted a Facilities Master Plan "as the guiding document for specific facility improvements" at the three campuses
- In January 2007, the District Board approved an Mitigated Negative Declaration (MND) for a Facilities Improvement Project for CSM

Citizens for a Green San Mateo

BACKGROUND (CONT.)

- The Initial Study supporting the MND discussed tree removal
  - The Project "would result in the *removal and pruning of an unknown number of trees*"
  - The Project "could require the removal of mature trees and vegetation"
  - "Individual *tree removal would be compensated by planting of replacement trees and vegetation* around new and renovated buildings and parking lots, at campus entrances, and within the overall enhanced landscape design for the campus"
  - The "Loop Road" in the Gateway portion of campus "could be repaved" and "modified with landscape treatment"

Citizens for a Green San Mateo

BACKGROUND (CONT.)

- In mid-September 2010, the District published newspaper notice that it sought bids for the North Gateway Phase I work; the Notice
  - described the work as including "*tree removal and pruning*"
  - listed the name and telephone numbers of seven physical locations where the bid documents could be obtained
  - included a link to the project Web site, which identified the need for and benefits of the proposed tree removal
  - directed interested parties to a Web site where additional project documents could be downloaded
    - Among the bid documents was the Project Manual, which included a "Tree Protection Plan" based on the MND and "listed every tree that was to be removed"

Citizens for a Green San Mateo

BACKGROUND (CONT.)

- On November 17, 2010, District approved contract for construction of North Gateway Phase I
  - The board report, included in the publicly available agenda packet, specifically referenced "tree work at the North Perimeter Road [a.k.a. Loop Road] as directed by the local Fire Marshall"
- On December 28, 2010, subcontractor Atlas Tree Service started removing trees in North Gateway area
- On July 1, 2011, unhappy neighbors file CEQA lawsuit challenged January 2007 MND, citing allegedly unanticipated impacts caused by tree-cutting

Citizens for a Green San Mateo

- Litigation challenging MNDs under CEQA must be filed within 30 days after the posting of the Notice of Determination (NOD) (Pub. Resources Code, § 21167, subd. (b))
- Litigation "alleging that a public agency has improperly determined that a project is not subject to" CEQA must be filed within 180 days from either
  - the date of the agency's decision to carry out or approve the project, or
  - the "date of commencement of the project" (where "a project is undertaken without a formal decision by the public agency") (Pub. Resources Code, § 21167, subd. (d))
  - A 35-day, rather than a 180-day, statute of limitations applies where the agency files a Notice of Exemption (*id.*)

Citizens for a Green San Mateo

- In *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, the California Supreme Court set rules applicable to situations in which public project approvals are substantially modified by nonpublic agency actions
  - Commencement of statute of limitations is tolled until the plaintiff "knew or reasonably should have known that the project under way differs substantially from the one described in the EIR"
  - As approved, the theater at issue in *Concerned Citizens* would have seated 5,000 on six acres, but as being constructed it would seat 7,000 on a site expanded to 10 acres

Citizens for a Green San Mateo

- Because "tree removal constituted a subsequent activity encompassed within the original CSM project," Petitioners' challenge to the MND was subject to a 30-day statute of limitations that ended in March 2007
  - "[T]he tree removal was not an independent project"
  - Although the IS/MND and NOD "do not specifically refer to tree removal along the Loop Road," the documents "arguably put the public on notice that trees could be removed anywhere on campus, including along the Loop Road"

Citizens for a Green San Mateo

- Even assuming for the sake of argument that the MND did not provide adequate notice of tree cutting activities in North Gateway, the 180-day statute of limitations began to run on November 17, 2010, when the Board approved the contract for North Gateway Phase I improvements
  - The "administrative record clearly indicates adequate public notice was given regarding the North Gateway Phase I project and its associated tree removal activities"

Citizens for a Green San Mateo

- Even assuming for the sake of argument that the actions of November 17, 2010, did not provide adequate notice, the 180-day period began to run on December 28, 2010, "when trees along the West Perimeter Road were removed"
  - "[T]he test under *Concerned Citizens* is not confined to actual awareness of the challenged activities"
    - Petitioners claimed they first learned of the tree-cutting on January 5, 2011
  - "[T]he relevant inquiry is when the plaintiffs 'knew or reasonably should have known that the project under way differs substantially' from the one described in the environmental review documents"

The Administrative Record and CEQA

ISSUES RELATING TO ADMINISTRATIVE RECORDS

- Scope of Record of Proceedings:
  - CEQA broadly defines "record of proceedings" as including, *but not being limited to*, many enumerated items, including
    - All *project application* materials
    - All *staff reports and related documents* prepared by agency with respect to CEQA compliance and action on the project
    - All *written testimony or documents* submitted by any person relevant to any findings or statement of overriding considerations adopted by agency

Scope of Record (cont.)

- Record includes
  - *Any transcript or minutes* of proceedings where agency decisionmaking body heard testimony on, or considered any environmental document on, the project
  - Any transcript or minutes of proceedings before any *advisory body* presented to decisionmaking body prior to action on the environmental documents or the project
  - All *notices* issued by the agency to comply with CEQA or with any other law governing the processing and approval of the project
  - All *written comments* received in response to, or in connection with, environmental documents prepared for the project, including responses to Notice of Preparation

Scope of Record (cont.)

- Record includes
  - All *written evidence* or *correspondence* submitted to, or transferred from, the agency with respect to CEQA compliance or the project
  - Any proposed decisions or findings *submitted to the decisionmaking body* of the agency by its staff, or the project proponent, project opponents, or other persons
  - The *documentation of the final agency decision*, including the final EIR, MND, or ND
  - All documents cited or relied on in the findings or in a statement of overriding considerations
  - The *full record of any inferior decisionmaking body* whose decision was appealed to a superior administrative decisionmaking body prior to the filing of litigation

Scope of Record (cont.)

- Record includes
  - Any other *written materials* relevant to the agency's CEQA compliance or its decision on the merits of the project, including
    - any drafts of any environmental document, or portions thereof, *that have been released for public review*
    - copies of studies or other documents relied upon in any environmental document prepared and either
      - *made available to the public during the public review period* or
      - *included in the respondent public agency's files on the project*
    - *all internal agency communications*, including staff notes and memoranda related to the project or CEQA compliance

Partial Record at Time of Public Review

- The *Notice of Availability* of ND, MND, or DEIR must specify, among other things:
  - the address where copies of the DEIR, MND, or ND and *all documents referenced in* the DEIR, MND, or MND *are available for review*

(PRC § 21092(b)(1); CEQA Guidelines §§ 15072(g)(4), 15087(c)(5))

- Early planning for record assembly facilitates compliance with this requirement

Record Organization for Litigation

- In CEQA litigation, record organization is governed by Rules 3.1365 through 3.1368 of the California Rules of Court
  - Rule 3.1365: except as provided by stipulation of the parties or by court order after a motion of the court or a party, the record must be organized in the following order, as applicable:
    - The Notice of Determination;
    - The resolutions or ordinances adopted by the lead agency approving the project;
    - The CEQA Findings and any statement of overriding considerations;
    - The final EIR, including the draft EIR or a revision of the draft, all other matters included in the final EIR, and other types of CEQA environmental impact documents, such as a ND, MND, or addendum;
    - The initial study;
    - Staff reports prepared for administrative bodies providing subordinate approvals or recommendations to the lead agency, in chronological order;
    - Transcripts and minutes of hearings, in chronological order; and
    - The remainder of the record, in chronological order

Record Organization for Litigation

Rule 3.1365 (cont.)

- Record must be separated by *tabs* or marked with *electronic bookmarks* that identify each part of the record listed above
- A *detailed index* at the beginning of the record must
  - list each document in the order presented, or in chronological order if ordered by the court, including
    - title
    - date of the document
    - brief description
    - volume and page where it begins
  - list any included exhibits or appendixes
  - list each document contained in any exhibit or appendix (including EIR appendixes) and the volume and page where each document begins

Record Organization for Litigation

Rules 3.1366 and 3.1367

- Rules governing the use of *electronic records*
  - If the party preparing the record elects or is ordered to prepare an electronic version
    - a court may require the party to lodge one paper copy
    - a party may request the record in paper format and
      - pay the reasonable cost or
      - show good cause for a court order requiring the party preparing the record to serve the requesting party with one paper copy

Record Organization for Litigation

Rules 3.1366 and 3.1367 (cont.)

- Electronic version of the record lodged in the court must be:
  - In compliance with rule 3.1365;
  - Created in pdf or other format for which the necessary software is in the public domain or is generally available at a reasonable cost;
  - Divided into a series of electronic files;
  - Include electronic bookmarks that identify each part of the record and clearly state the volume and page numbers contained in each part of the record;
  - Contained on a CD-ROM, DVD, or other medium in a manner that cannot be altered; and
  - Capable of full text searching

Record Organization for Litigation

Rules 3.1366 and 3.1367 (cont.)

- The *electronic version of the index* may include hyperlinks to the indexed documents
- Electronic version of record need not include "any document that is part of the record" but "for which it is not feasible to create an electronic version"
  - "Not feasible" means that "it would be reduced in size or otherwise altered to such an extent that it would not be easily readable"
  - Omitted documents must be provided in paper format

Special Rules for "Environmental Leadership Projects"

- CEQA includes special processing and litigation rules for defined "*environmental leadership projects*"
  - Record must be updated constantly during CEQA process
  - Documents must be converted into readily accessible electronic format except for copyrighted materials not prepared for project
  - Record must be submitted expeditiously in litigation

(PRC §§ 21178 – 21189.3 [added by Stats.2011, c. 354 (A.B.900), § 1; amended by Stats.2013, c. 386 (S.B.743), § 12]; see also Cal. Rule of Court, Rule 8.497.)

Environmental Leadership Projects (cont.)

- Record must be prepared "*concurrently with the administrative process*"
- All record documents and materials must be posted on, and be downloadable from, web site maintained by the lead agency as of date of release of DEIR
- The lead agency shall make the following available to the public in a "readily accessible electronic format":
  - DEIR
  - All other documents submitted to, or relied on by, lead agency in preparing DEIR

Environmental Leadership Projects (cont.)

- Documents prepared by lead agency or submitted by applicant after release of DEIR must be made available in electronic form within five business days release or receipt by lead agency
- The lead agency shall encourage electronic comments and make them available to the public in electronic format within five days of receipt
- Within seven business days of receipt of comment not in electronic format, the lead agency shall convert that comment into an electronic format and make it available to the public

Environmental Leadership Projects (cont.)

- Special rules for "documents submitted to or relied on by lead agency that were not prepared specifically for the project and are *copyright protected*"
  - Lead agency need not make then available in electronic format
  - Lead agency shall make an electronic index of these documents available
    - no later than the date of the release of DEIR or
    - within five business days if the document is received or relied on by the lead agency after the release of DEIR
  - Index must specify the libraries or lead agency offices in which hardcopies of the copyrighted materials are available for public review

Environmental Leadership Projects (cont.)

- The lead agency shall certify the final record within five days of project approval
- Superior court shall resolve any dispute regarding record
  - Unless court directs otherwise, party disputing record contents must file motion to augment at time of filing its initial brief

Scope of Record: How Far Back in Time to Go?

- *County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1
  - *Court of Appeal issues writ directing trial court to include in record documents relating to earlier version of project challenged in previous litigation*
    - Complete record should include materials relating to original 705-unit version of project invalidated after earlier litigation, not just materials relating to revised 299-unit project
      - EIR was prepared for original project
      - Addendum was prepared for modified (reduced) project

How Far Back in Time to Go?

County of Orange (cont.)

- Statutory language "contemplates that the . . . record will include pretty much *everything that ever came near* a proposed development *or* to the agency's compliance with CEQA in responding to that development"
- The CEQA process is iterative, often leading to environmentally beneficial changes in projects, and the record should reflect that evolution

How Far Back in Time to Go?
County of Orange (cont.)

- Burden of showing prejudice from the overinclusion of materials in the record lies with petitioners
  - They "have the most to gain from any underinclusion"
  - Project proponents, in contrast, are "saddled with the task of pointing to things in the record to refute asserted inadequacies in the EIR"
  - Any *reduction* in contents of record is thus presumptively prejudicial to proponents

How Far Back in Time to Go?(cont.)

- *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322
  - *Court invalidates MND, and orders EIR, for 17-acre, 21-unit residential subdivision*
    - Administrative record was deficient for not including documents reflecting earlier 28-unit version of proposed project
      - Petitioner advocated inclusion of, among other documents, a 1989 biotic assessment for earliest version of project

How Far Back in Time to Go?
Mejia (cont.)

- CHRONOLOGY
  - 1990: County approves 28-unit tentative tract map for subject site, but map expires
  - 1999: new application seeks approval of "same project" as approved in 1990
  - 2000: County approves new tract map for 23, not 28, units
  - July 2001: trial court sets aside County's 2000 23-unit approval due to notice deficiency
  - September 2001: County staff prepares a new initial study
  - 2002: staff revises Initial Study twice
  - 2003: Board of Supervisors approves a new map for 21 units
  - 2004: County certifies administrative record with no documents dated before July 2001 court judgment in prior notice litigation

How Far Back in Time to Go?
Mejia (cont.)

- As prepared by city, the record excluded such things as application materials, staff reports, correspondence, environmental studies, and other types of documents mentioned in PRC § 21167.6(e)
- The June 1999 submittal was relevant "project application" to consider
  - That project and the 1990 project had relied on a 1989 biotic assessment
    - This document was relevant to City's most recent finding that the 21-unit project would have no impact on wildlife

How Far Back in Time to Go?
Mejia (cont.)

- Consideration of the Biotic Assessment affected the outcome of the case – the need for an EIR:
  - Biotic Assessment found no potentially significant impacts, but described the site as being "relatively rich in animal life" and supporting
    - 340 trees, mostly ornamental
    - a number of bird species, including two of special concern to CDFG
    - the Pacific Kangaroo rat

How Far Back in Time to Go?
Mejia (cont.)

- Based on Biotic Assessment and other evidence, such as personal observations of wildlife, Court of Appeal found a fair argument and ordered an EIR
  - The "expert" 1989 Biotic Assessment corroborated the more recent lay observations to some extent
  - Absent a more recent Biotic Assessment, the record did not preclude the reasonable possibility that birds may roost or nest on the property or that the project would eliminate a wildlife movement corridor

Scope of Record Revisited

- *Consolidated Irrigation Dist. v. Superior Court* (2012) 205 Cal.App.4th 697 *("Consolidated II")*:
  - *Court of Appeal grants petition for writ to address issues related to administrative record in lawsuit over EIR between irrigation district and City of Selma*:
    - The record of proceedings in a CEQA case includes
      - audio tapes of non-transcribed hearings
      - documents and information websites referenced in comment letters where the agency can readily obtain the documents
      - consultants' files that are constructively owned by the lead agency

Scope of Record (cont.)
Consolidated II

- Reference to "any transcripts" means that where transcripts or minutes do not exist, they need not be prepared
- "Written materials" under § 21167.6(e)(10) includes *audio recordings* of meetings for which no transcripts were prepared
- "Written comments" under § 21167.6(e)(6) does *not* include "documents cited [without attachment] to support the assertions and contentions made in the comment letter"
  - These references are "evidence," not "comments"

Scope of Record (cont.)
Consolidated II

- "Written evidence" that is "submitted" to agency under § 21167.6(e)(7)
  - Includes materials "readily available for use or study by lead agency personnel," such as
    - Specific website references
    - Documents mentioned in comments already in agency's files
    - Documents that commenter identifies and volunteers to make available to agency
  - Does *not* include
    - documents that could only be found after time spent "searching for documents" starting from a "general Web site" cited by commenter
    - Documents only "named" in comments without reference to any Web site

Scope of Record (cont.)

Consolidated II

- Agency's "files" under under § 21167.6(e)(10) include files owned or in the possession of the public agency"
  - "[P]ossession denotes custody, control, or dominion and includes both actual and *constructive possession*"
  - Under the terms of its contract with the primary EIR consultant, the city
    - had constructive possession of primary consultant's files
    - did not have constructive possession of the sub-consultants' files

Attorney Client Privilege

- *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363:
  - Neither the Public Records Act nor the Brown Act was intended to abrogate the attorney-client privilege of public agency decisionmakers
  - By implication, CEQA administrative records need not include documents subject to attorney-client privilege

Attorney Client Privilege (cont.)

- *Citizens for Ceres v. Superior Court of Stanislaus County* (2013) 217 Cal.App.4th 889:
  - *In case involving challenge to EIR for Wal-Mart anchored shopping center, Court of Appeal grants writ overturning trial court order excluding documents from administrative record; appellate court holds that "common-interest doctrine" does not protect communications between lead agency and applicant occurring prior to project approval*

Attorney Client Privilege

Citizens for Ceres (cont.)

- Prior to project approval, there is no "common interest" between agencies and applicants
  - The lead agency is supposed to be neutral and objective, and its interest in is complying with CEQA
    - CEQA documents must be unbiased
    - Agencies cannot commit to approve project before completion of any required environmental analysis
  - In contrast, the applicant's primary interest is in obtaining project approval and a *favorable* CEQA document
  - Although both agencies and applicants want documents to survive judicial review, the parties may have different interests with respect to impact conclusions that could go either way (significant or less than significant)

Attorney Client Privilege (cont.)

Citizens for Ceres

- To the extent that the Third District Court of Appeal's decision in *California Oak Foundation v. County of Tehama* (2009) supports the conclusion that the common-interest doctrine may apply to agency-applicant communications during the administrative process prior to project approval, the Fifth District Court of Appeal disagrees
  - The facts in *California Oak Foundation* are unclear on this point – the *Citizens for Ceres* case may create a conflict between the two appellate districts, yet no petition for review was sought in this case

Attorney Client Privilege (cont.)

- *California Oak Foundation v. County of Tehama* (2009) 174 Cal.App.4th 1217:
  - Court of Appeal for Third Appellate District upholds trial court decision rejecting inclusion in administrative record of materials subject to attorney client privilege
    - Excluded materials included opinions of county's outside counsel shared with counsel for applicant
  - Court confirms that section 21167.6(e) does not abrogate the attorney client privilege

Administrative Record (cont.)
California Oak Foundation

- "Common Interest Doctrine" is a *nonwaiver* doctrine
  - No waiver occurs where communication of attorney-client advice to others is *reasonably necessary to accomplishment of the purpose of the advice*
  - Here, purpose of getting advice of outside counsel was to achieve CEQA compliance, including producing an EIR that will withstand legal challenge
  - No waiver occurred where County shared advice of outside counsel with "codefendant in the *subsequent joint endeavor* to defend the EIR in litigation"
    - It "can reasonably be said" that such disclosure to "third persons" was "reasonably necessary to further the purpose" of the original consultation

Deliberative Process Privilege

- Senior officials of all three branches of government enjoy a qualified, limited privilege not to disclose or to be examined concerning
  - the mental processes by which a given decision was reached
  - the substance of conversations, discussions, debates, deliberations and like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated

Deliberative Process Privilege (cont.)

- *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296

  Court upholds revised EIR for use permit for Wal-Mart Supercenter:
  - Deliberative Process Privilege applies to the creation of CEQA administrative records, but:
    - Agency withholding documents bears burden of justifying withholding of documents
    - Agency must explain the public's specific interest in nondisclosure in a particular case

Deliberative Process Privilege

Citizens for Open Government (cont.)

- Despite City's failure to properly justify withholding certain documents, reversal of trial court ruling excluding those documents was not required
  - Appellant had failed to attempt writ review on record issues during trial court proceeding and could not show prejudice due to lack of disclosure
    - Court rejects notion that attempt to secure appellate writ during trial court proceeding was likely to fail

Deliberative Process Privilege (cont.)

- Elements of § 21167.6(e) can be harmonized with deliberative process privilege, as record need only include:
  - "proposed decisions or findings" submitted to "*decisionmaking body*" by staff, project proponent, project opponents, or others
  - drafts of any environmental document, or portions thereof, that have been *released for public review*

Consequences of a Disorganized Record

- *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362
  - *Court invalidates approval of conditional use permit and EIR for aggregate mining project because the poor organization of administrative record made judicial review of key legal documents impossible*
    - The record was so poorly organized and indexed, and the documents so incomplete and badly labeled, that it was impossible to identify the actual CEQA findings adopted by the board of supervisors

Consequences of a Disorganized Record *Protect Our Water* (cont.)

- *Even though petitioners had prepared the record*, the county ultimately was responsible for certifying its accuracy
- Because the record was incomplete and inadequate, the required evidence of compliance was lacking, requiring invalidation of project approval

– Update/commentary: problems with disorganized records should be greatly reduced by compliance with Rules 3.1365 through 3.1368 of the California Rules of Court

Possible Consequences of an Incomplete Record

- *Environmental Protection & Information Center v. California Department of Forestry and Fire Protection* (2008) 44 Cal.4th 459:
  - *Supreme Court sets aside Sustained Yield Plan (SYP) for logging property owned by Pacific Lumber in Humboldt County*
    - No prejudice resulted from lead agency's failure to consider certain documents or include them in record, even though they should have been considered and included

Possible Consequences of an Incomplete Record (cont.)

- Omitted material consisted of:
  - Scholarly articles submitted with comments addressing subjects generally related to subjects addressed in a SYP
    - Court characterized these documents as "non-project-specific secondary materials submitted in support of . . . Comments"
  - Written comments submitted at public hearings, both for and against project
  - Comments submitted after close of formal public review period

Possible Consequences of an Incomplete Record (cont.)

- "[E]rrors in the CEQA or THP process which are insubstantial or de minimis are not prejudicial"
- Failure to consider public comments is not prejudicial where material is
  - on its face, demonstrably repetitive of material already considered
  - so patently irrelevant that no reasonable person could suppose the failure to consider it prejudicial
  - supportive of agency action

Method for Resolving Disputes Over Record Contents

- *Madera Oversight Coalition, Inc. v. County of* Madera (2011) 199 Cal.App.4th 48:
  - *Court sets aside EIR for Tesoro Viejo mixed use development*
    - Agency's action in certifying record is ministerial
    - Trial court is proper body to resolve disputes over what is in or out of record
      - Trial court acts as trier of fact, not court of review
      - Court of Appeal reviews trial court's decision, not agency's decision, on what to include or exclude

Method for Resolving Disputes Over Record Contents (cont.)

- *Consolidated Irrigation District v. City of Selma* (2012) ("*Consolidated* I") 204 Cal.App.4th 187
  - *Court addresses only procedural issues in irrigation district's challenge to negative declaration for development project*:
    - Court of Appeal should defer to trial court's factual determinations, based on declarations, as to whether disputed evidence was submitted to the agency and thus is part of the administrative record

Costs of Record Preparation

- *St. Vincent's School for Boys, Catholic Charties CYO v. City of San Rafael* (2008) 161 Cal.App.4th 989
  - *Court of Appeal upholds EIR for San Rafael General Plan Update and awards costs to prevailing respondent agency for time spent producing emails in response to onerous discovery request from petitioner*

Costs of Record Preparation
St. Vincent's (cont.)

- Trial court awarded city $26,362.50 in costs for time spent responding to petitioner's discovery requests for emails
- Court of Appeal rejects Petitioner's argument that, because it elected to prepare the record itself pursuant to § 21167.6(b)(2), city could not recover any of its costs associated with the record

Costs of Record Preparation
St. Vincent's (cont.)

- § 21167.6(f)provides that "*the party preparing the record shall strive to do so at reasonable cost* in light of the scope of the record"
  - Electing to prepare record does not guarantee petitioner that respondents will not reasonably incur any costs
  - "[W]here necessary to preserve the statutory purposes of cost containment and expediting CEQA litigation, the prevailing party in a CEQA action may recover 'reasonable costs or fees imposed for the preparation' of the record, even if the non-prevailing party elected to prepare the record

Costs of Record Preparation *St. Vincent's* (cont.)

- Under facts of case, trial court's award was reasonable
  - Petitioner's discovery demanded, among other things, "all writings evidencing or reflecting communications, stored on computer hard drive or server of any City employee, relating to or in connection with St. Vincent's property or the Silveira property"
  - Petitioner "subjected the City to a costly and lengthy process of trawling through its entire computer system in response to an extremely broad and unbounded search"
  - "This record reflects a total disregard for cost containment on St. Vincent's part, and a complete abandonment of its statutory duty to 'strive to [prepare the record] at reasonable cost'"

Costs of Record Preparation (cont.)

- *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1
  - The trial court erred in requiring the losing petitioner to bear $6,067.94 for the cost of preparing a transcript of a Planning Commission meeting
    - § 21167.6(e) only mandates inclusion of planning commission transcripts where they were presented to decision-makers (city councils or boards of supervisors) *prior* to their action on the project
    - Here, the transcripts were made *after* project approval

"Late Hit" Issue

Citizens for Responsible Equitable Environmental Development v. City of San Diego (2011) 196 Cal.App.4th 515 ("*CREED*")

- *Court upholds 2008 addendum to 1994 EIR for Playa Del Sol development within larger mixed used project area covered in EIR*

Late Hit Issue

CREED (cont.)

- On day of final hearing, opponents submitted DVD with
  - more than four thousand pages of documents and data
  - no table of contents
  - no particular organization
  - no summary of information
  - no explanation of how the copious materials may pertain" to project
- Petitioner did not appear at hearings "to elaborate its position"

Late Hit Issue

CREED (cont.)

- This was not sufficient to exhaust administrative remedies regarding argument that Supplemental EIR was required due to drought conditions
  - Petitioner's legal theory was not "fairly presented" to agency
    - City "cannot be expected to pore through thousands of documents"

Late Hit Issue (cont.)

- *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184:
  - EIR for cogeneration project upheld
  - Court did not address merits of issues raised for first time in 16-page, single spaced letter (with 101 pages of supporting materials) delivered by Plaintiffs to Board of Supervisors one day prior to hearing

Late Hit Issue

Mount Shasta (cont.)

- Board was acting in appellate capacity, reviewing decision of Planning Commission to approve conditional use permit needed for project
  - County appeal process rules required submission of documentary evidence into record at least five days prior to Board hearing
  - Court rejects Plaintiffs' argument that they can rely on any information and legal theories raised any time prior to *Board's approval* of project
    - Planning Commission, not Board, approved project
    - Board sat on appeal, and County administrative rules on appeals governed the timing of submissions to Board

Late Hit Issue

Mount Shasta (cont.)

- Relevance to late hit issue under CEQA:
  - Court did not explicitly mention Pub. Resources Code § 21177(a), which allows exhaustion of administrative remedies up until "close of the public hearing on the project"
  - Did Court implicitly hold that relevant hearing for purposes of this statutory language is Siskiyou County Planning Commission?

Late Hit Issue

Mount Shasta (cont.)

- If so, note generally that Planning Commissions lack legislative power and act in purely advisory capacity for CEQA projects requiring legislative actions (general plan amendments, specific plans, rezones, etc.)
- For quasi-adjudicatory actions (tentative maps, use permits, variances, etc.) that are legally final absent an appeal to Board of Supervisors or City Council, *Mount Shasta* decision could force would-be plaintiffs to appeal all arguments they want to preserve for court and make them subject to deadlines found in local administrative appeal procedures
- *Mount Shasta* decision would still allow late hits in CEQA proceedings for projects requiring legislative actions

Thank you for attending

CEQA Update, Issues and Trends